Supreme Court, U.S.
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No. 95-___

In The

Supreme Court of the United States

October Term, 1995

GLADYS MURRAY, On Behalf of Herself and All Others Similarly Situated (and 27 Other Individuals),

Petitioners,

v.

STUCKEYS, INC., and PET INCORPORATED,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Under the "clearly erroneous" standard of review, may the Court of Appeals ignore all evidence and credibility determinations favorable to the prevailing parties and concentrate solely on evidence favorable to the losing party having the burden of proof on the FLSA "executive exemption" and set aside five separate findings of fact by the trial court in favor of employees earning less than $250 per week?

2. Was the Court of Appeals justified in departing from, and creating a conflict with, other courts of appeals in FLSA cases and substituting its judgment for that of the trial court on five separate findings of fact?

3. Has the Court of Appeals so far departed from the accepted and usual course of proceedings as to call for an exercise of this Court's power of supervision when the court of appeals ignores previous controlling decisions of this Court in other FLSA cases and substitutes its judgment for that of the trial court on five separate findings of fact when any one of the trial court's findings of fact would support the judgment of the trial court?

4. Pursuant to Rule 16.1, should this Court on the merits summarily reverse the decision of the Court of Appeals ignoring controlling decisions of this Court and conflicting with decisions of other courts of appeals, thereby departing from the accepted and usual course of proceedings?

LIST OF PARTIES TO THE PROCEEDING

1. Gladys Murray
2. Floyd Caskey
3. Allan Christiansen
4. Donald Scott
5. Deborah L. Hoyt
6. Russell C. Renecker
7. Eugene A. Rutledge
8. Lawrence B. Taylor
9. Warren Kajander
10. Jeannette Petrimoulx
11. Kinney Bryant
12. Carol S. Lewis
13. Harley Blair
14. Thomas Miller
15. Sandra Crist
16. Larry Brown
17. Randy Bushnell
18. Bobbie Cockerell
19. Mary T. Cope
20. Stanley Dixon
21. Thomas Foster
22. Edward Geisenheimer
23. Rae Jean Hamilton
24. Loren Jacoby
25. Donald Phillips
26. Joy M. Powers
27. Arthur Stotts
28. David Tompkins
29. Stuckey's, Inc.
30. Pet Incorporated

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit filed March 20, 1995 (rehearing denied April 25, 1995), reversing findings of fact made by the United States District Court for the Northern District of Iowa, Western Division on remand by the Court of Appeals for findings of fact on those very factual issues.

OPINIONS BELOW

The opinion of a three-judge panel of the Court of Appeals reversing findings of fact (after remand for those very findings) with instructions to dismiss was filed March 20, 1995, was reported as *Murray v. Stuckey's, Inc.*, 50 F.3d 564 (8th Cir. 1995) (*Murray II*), and is reprinted in the Appendix at pages 1a-17a (Appendix A).

The order of the Court of Appeals denying Plaintiffs' Petition for Rehearing, with Suggestion for Rehearing En Banc, was filed April 25, 1995, and is reprinted in the Appendix at page 18a (Appendix B).

The trial court's first unpublished opinion after remand (making the findings of fact requested by the Court of Appeals in its first opinion) is dated April 16, 1993. The trial court found that the defendants had not met their burden of proof that plaintiffs customarily and regularly directed the work of two or more employees and that the defendants had not met their burden of proof that the plaintiffs customarily and regularly exercised discretionary power. That opinion is reprinted in the Appendix at pages 19a-42a (Appendix C).

The trial court's second unpublished opinion after remand entered judgment in favor of plaintiffs in specified amounts and awarded attorney fees to plaintiffs' counsel, is dated April 15, 1994, and is reprinted in the Appendix at pages 43a-59a (Appendix D).

The first opinion of the same three-judge panel of the Court of Appeals reversing and remanding in part the award of the trial court, was filed July 25, 1991, was reported as *Murray v. Stuckey's, Inc.*, 939 F.2d 614 (8th Cir.

1991), *cert. denied*, 502 U.S. 1073 (1992) (*Murray I*), and is reprinted in the Appendix at pages 60a-80a (Appendix E).

The order of the Court of Appeals denying Plaintiffs' Suggestion for Rehearing En Banc by reason of a lack of a majority (with at least one Circuit Judge dissenting) and denying the Petition for Rehearing was filed on September 19, 1991 and is reprinted in the Appendix at page 81a (Appendix F).

The trial court's unpublished opinion after trial making findings of fact that Defendants had failed to sustain their burden of proof that the Plaintiffs were exempt from the overtime provisions of the Fair Labor Standards Act is dated and filed on July 17, 1989 and is reprinted in the Appendix at pages 82a-121a (Appendix G).

The trial court's unpublished opinion on Plaintiffs' Motion to Alter or Amend and to Determine Attorney Fees is dated January 5, 1990, was filed on January 8, 1990 and is reprinted in the Appendix at pages 122a-129a (Appendix H).

The trial court's unpublished opinion awarding damages (including liquidated damages), and reducing the attorney fee award is dated July 14, 1990, was filed July 16, 1990, and is reprinted in the Appendix at pages 130a-142a (Appendix I).

The trial court's unpublished opinion reconsidering the attorney fee award dated January 5, 1990 (filed January 8, 1990) is dated and filed October 31, 1990 and is reprinted in the Appendix at pages 143a-147a (Appendix J).

JURISDICTION

The second opinion of the three-judge panel of the Court of Appeals is dated and was entered on March 20, 1995. The Order of the same Court denying the Petition for Rehearing with Suggestion for Rehearing En Banc is dated and was entered on April 25, 1995. This Petition is filed within ninety (90) days of that date. The statutory provision believed to confer jurisdiction on this Court to review that judgment by writ of certiorari is 28 U.S.C. 1254(1), and we believe the applicable rule of this Court is Rule 10.1(a) and (c).

STATUTES, FEDERAL RULES, AND REGULATIONS INVOLVED

Federal Rule of Civil Procedure 52(a) (in Appendix, page 148a, Appendix K)

Fair Labor Standards Act (FLSA) of 1938 as amended, 29 U.S.C. § 216(b), Section 16(b) (in Appendix, pages 149a-150a, Appendix L).

Fair Labor Standards Act (FLSA) of 1938 as amended, 29 U.S.C. § 213(a)(1), Section 13(a)(1) (in Appendix, page 151a, Appendix M).

STATEMENT OF THE CASE

Gladys Murray and Sidney Murray, on behalf of themselves and all others similarly situated, brought an action against Respondents in the United States District Court for the Northern District Court of Iowa, Western

Division. Jurisdiction of the district court was based upon Section 16(b) of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 216(b) and 28 U.S.C. § 1337.

The complaint sought overtime pay, liquidated damages, attorney fees and costs under the FLSA. The case was tried to the court by ordinary proceedings and judgment was entered in favor of all Petitioners based upon detailed findings of fact.

Defendants contended that all Petitioners were exempt from the overtime provisions of the Act under the "executive" exemption, 29 U.S.C. § 213(a)(1), but acknowledged that Defendants have the burden of proof on this factual issue. This issue was listed as a factual issue by both parties in the Pre-Trial Order.

In *Murray I*, a three-judge panel of the Court of Appeals set aside three separate findings of fact showing failure to satisfy the Section 13(a)(1) exemption requirements, without any reference to the "clearly erroneous" standard of Federal Rule of Civil Procedure 52(a). The Court of Appeals remanded for findings of fact by the trial court on two other factual issues relating to the conjunctive requirements for the exemption.

The trial court, based in part on credibility findings, found in favor of Petitioners on each of these two factual issues (conjunctive in nature) and entered judgment in favor of Petitioners. Defendants again appealed.

The same three-judge panel set aside the very findings of fact for which the panel had directed remand. This time the panel paid lip service to the "clearly erroneous" standard, but ignored substantial evidence favorable to

Petitioners and also ignored two United States Supreme Court decisions dealing with exemptions under the FLSA.

Those cases are controlling herein. The panel directed the trial court to dismiss the action. Those cases, *Walling v. General Industries Co.*, 330 U.S. 545 (1947) and *Icicle Seafoods Inc. v. Worthington*, 475 U.S. 709 (1986), had been cited by Petitioners herein in their briefs in the Court of Appeals, but were ignored by Pet and Stuckey's in their briefs.

REASONS FOR GRANTING THE WRIT

FIRST OF ALL, THE COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH APPLICABLE CONTROLLING DECISIONS OF THIS COURT. FURTHER, THE OPINIONS OF THE EIGHTH CIRCUIT CONFLICT WITH RECENT DECISIONS OF THE FIFTH CIRCUIT, THE THIRD CIRCUIT, AND THE ELEVENTH CIRCUIT. ADDITIONALLY, THE EIGHTH CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

A. *Murray I* Was Not Final and so is Subject to Review as Well as *Murray II*.

Murray I remanded the cause to the trial court for additional findings of fact. Accordingly, *Murray I* was not final and does not constitute the law of the case, collateral estoppel, or res judicata. *Hughes Tool Company v. Trans World Airlines*, 409 U.S. 363, 365 n.1 (1973). Accordingly, this Court may review *Murray I* as well as *Murray II*.

Therefore, this Court has before it the propriety of setting aside five separate findings of fact of the trial court, any one of which alone would support the final judgment of the trial court.

B. Both *Murray I* and *Murray II* Conflict with Decisions of this Court.

As long ago as 1947, this Court held that the question of whether a worker falls within the exemption for "executives" under 29 U.S.C. § 213(a)(1) is a factual question subject to the "clearly erroneous" standard of review set forth in Federal Rule of Civil Procedure 52(a). *Walling v. General Industries Co.*, 330 U.S. 545, 550 (1947) (disapproving court of appeals' rejection of trial court findings as to executive exemption).

In 1986, this Court reversed the Ninth Circuit because it engaged in fact-finding in a case involving an exemption under FLSA. *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709 (1986). This Court (by Justice Rehnquist) said in reversing:

> "We think the Court of Appeals was mistaken to engage in such factfinding." 475 U.S. at 714.
>
> and
>
> "The question of how the respondents spent their working time aboard the *Arctic Star* is a question of fact." *Id.*[1]

---

[1] Of course the ultimate test for "executive exemption", in the words of Section 13 (29 U.S.C. § 213(a)), is whether the employee is "employed in a *bona fide* executive capacity".

According to Shepard's, *Icicle* has been cited and followed by every court of appeals *except* the Eighth Circuit. *Shepard's United States Citations*: 7th Case Ed. – 1995 (Vol. 3.7), at 1286-87; Semiannual Cum. Supp., Pt. 3 – S.Ct. Rep. (Vol. 94, No. 1, Jan. 1, 1995) at 407; Cum. Supp., Pt. 3 – S.Ct. Rep. (Vol. 94, No. 9, May 1, 1995) at 172. *Icicle* is the law of the land. *Icicle* has been cited by Plaintiffs in every filing made in the Court of Appeals but has been ignored by the Eighth Circuit. Plaintiffs respectfully suggest this Court should require the Eighth Circuit to join all other circuits in following *Icicle.*

Petitioners herein are not aware of any FLSA case, except this one, in which a court of appeals has set aside five separate findings of fact, any one of which would support judgment for Petitioners. Further, Petitioners are not aware of any FLSA case in which a circuit court set aside any finding of fact on the "executive exemption" issue or the "primary duty" issue where the employee was earning less than $250 per week. When earnings are less than $250 per week the "long test" becomes applicable.

In *Murray II*, judgment had been entered only with respect to employees earning less than $250 per week.

In both *General Industries, supra,* and *Icicle, supra,* this Court granted certiorari and reversed the court of appeals findings in FLSA cases dealing with exemptions.

(emphasis supplied) "*Bona fide*" is defined as " . . . in good faith without fraud or deceit", or " . . . with earnest intent". *Webster's New Collegiate Dictionary,* (G. & C. Merriam Co., 1979 ed.) 124. Questions of good faith and intent are always questions of fact.

In both cases, the trial court had made findings of fact and held in favor of employers that the employer had carried its burden of proof on the exemption issues presented.

In both cases the court of appeals reversed the trial court's findings of fact. In both cases this Court held that the action of the court of appeals was error.

In both cases the trial court had made factual findings in favor of the employer. In its first decision, the Murray trial court found that the duties of the claimed exempt employees and admittedly non-exempt employees were essentially the same. (1989 Order, Finding of Fact 17, p. 86a). That finding has *not* been disturbed. The three-judge panel also accepted the trial court's finding that the Plaintiffs spent 65%-90% of their time on non-managerial duties. (p. 68a). The trial court further found that:

(1) The Defendants have failed in their burden of proof that the employees were exempt from the overtime provisions of the Act. (Finding of Fact 29, p. 96a).

(2) Defendants have failed in their burden of proof that the primary duty of Plaintiffs was management. (Finding of Fact 28, p. 95a).

(3) Defendants failed in their burden of proof that Plaintiffs were in "sole charge" of their stores. (Finding of Fact 29, p. 96a). On remand after *Murray I*, with directions to make findings of fact on two other issues, the trial court held that:

(4) The Defendants had not met their burden of proof that Plaintiffs customarily and regularly directed the work of two or more employees. (p. 34a).

(5) The Defendants had not met their burden of proof that the Plaintiffs customarily and regularly exercised discretionary power (p. 38a).

The applicable regulation, 29 C.F.R. § 541.1, is set forth in *Murray II* (pp. 4a-5a). It was incorrectly or inaccurately set forth in *Murray I* (p. 66a).

In *Murray I* and *Murray II* the Court of Appeals has now set aside all five of those findings of fact and left standing the finding of fact that the duties of the employees claimed by defendants to be exempt and the employees who were admittedly non-exempt were essentially the same. (See Finding of Fact 17, p. 86a). That finding by the trial court is inconsistent with the new findings of the Court of Appeals.

Findings Nos. 4 and 5 above were set aside by the appeals court in *Murray II* after specific direction in *Murray I* to the trial court to make findings of fact on those very issues, in spite of having noted in *Murray I* that one of the issues was a contested issue at trial (p. 73a), and that Petitioners' discretion was circumscribed or limited (p. 72a).

Petitioners will now demonstrate in the following five subsections that all five of the trial courts' findings were supported by substantial evidence, or perhaps more accurately, because the Defendants had the burden of proof, the lack of evidence by Defendants.

B(1) Primary Duty

The credibility of the witnesses and the inferences to be drawn from the facts are factual matters for determination by the trial court. See *Dalheim v. KDFW-TV*, 918 F.2d 1220 (5th Cir. 1990). *See also Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564 (1985).

Like this case, *Dalheim* involved Section 13(a)(1) exemptions. A principal issue in *Dalheim* involved "primary duty" as in this case. The *Dalheim* trial court found in favor of the workers and against the employer on the issue of "primary duty" and the exemption, as the trial court did in this case.

The employer invited the Fifth Circuit to set aside the trial court findings. The Fifth Circuit declined to do so, citing *Icicle Seafoods* and *General Industries*.

The *Dalheim* court noted that the exemption is to be construed "narrowly against the employer" and that the employer " . . . must demonstrate clear error to prevail." 918 F.2d at 1226. The court stated:

> " . . . the . . . exemptions claimed by (the employer) requires the district court to *infer* from its findings of historical fact what constitutes the employees' 'primary duty' " (emphasis supplied) 918 F.2d at 1227.
>
> and
>
> " . . . whether an employee's work is "original and creative" in character and *whether such work is an employee's 'primary duty' are based on inferences from historical fact*. Such inferences are also reviewed for clear error" (emphasis supplied) *Id.* at 1226.

At least three witnesses in this case testified that their primary duty was not management. They testified, as did a former regional manager, that the duties of a so-called "manager" and admittedly non-exempt employees were essentially the same. The trial court held that the duties were essentially the same (1989 Order, Finding of Fact 17, p. 86a), and that finding of fact has not been set aside.

Additionally, a Senior Vice President testified that it was not unusual to have from 200 to 250 individual sales of gasoline during the day handled by a "manager" *in addition to his or her other routine duties.* (Lake Dep. p. 15). That was supported by testimony that the "managers" were really only "glorified gas boys" (E. Geisenheimer Dep. p. 27).

Allowing three minutes for each such gasoline sale would require from 10 to 12½ hours each day *in addition to his or her other routine duties.* The trial court was entitled to infer from this and substantial other testimony that the "primary duty" of the so-called "manager" was not management.

Substanial testimony also demonstrated that so-called "managers" spent the vast majority (65%-90%) of their time performing non-exempt duties having nothing to do with management (Finding of Fact 27, p. 94a). That finding has not been set aside and is inconsistent with the new findings of *Murray II.*

The trial court's finding was supported by substantial evidence, particularly considering the burden of proof on the Defendants. The panel should not be permitted to substitute its judgment for that of the trial court.

B(2) Sole Charge

The trial court held that because the duties of the so-called "managers" were shared by the regional manager and that the duties of the husband-wife team were essentially the same, the so-called "managers" were not in "sole charge." (1989 Order, p. 96a).

In *Murray I*, the panel reversed that determination without even holding that it was "clearly erroneous." (p. 74a). Instead, the panel relied on three trial court decisions with substantially different fact patterns, in which those trial courts held that the employee was in "sole charge." In one case, the parties *stipulated* that the employee was "in sole charge." *Marshall v. Sally Beauty Co., Inc.*, 25 Wage & Hour Cas. (BNA) 672, 94 Lab. Cas. (CCH) ¶ 34207 (E.D. La. 1982). In another case, the trial court observed that "the applicability of the sole charge exemption is an extremely close case." *Donovan v. Waffle House, Inc.*, 26 Wage & Hour Cas. (BNA) 868, 99 Lab. Cas. (CCH) ¶ 34,457 (N.D. Ga. 1983). If *Waffle House* had been decided the other way, it would not have been disturbed on appeal, as in this case, because it could not be found to be clearly erroneous.

Clearly the panel has substituted its judgment (or perhaps more accurately the judgment of other trial courts, in *different* fact patterns) for the judgment of the trial court in this case.

B(3) Failure of Burden of Proof on Executive Exemption

As noted above the trial court found that the Defendants failed in their burden of proof that the employees were exempt from the overtime provisions of the Act. (1989 Order, Finding of Fact 29, p. 96a).

When the trial court in a law action denies recovery because of the party's failure to carry the burden of proof on an issue, "no interference on appeal will occur absent overwhelming evidence in the party's favor that only one reasonable *inference* could be drawn." (Emphasis supplied). *Bebensee v. Ives*, 409 N.W.2d 710, 712 (Iowa App. 1987); *see Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573-76 (1985).

As noted in footnote 1, the question of whether the so-called "executive" is "bona fide" is a question of fact.

Where so much depends on the inferences to be drawn and the credibility of the witnesses as in this case, the panel was not justified in overturning this finding.

B(4) Supervising Two or More Employees

On remand, the trial court held that the Petitioners did not *customarily* and *regularly* supervise two or more other employees as required by 29 C.F.R. 541.1(b). (p. 34a). The "customarily and regularly" requirement was the fighting issue on this finding.

In *Murray II*, the panel held that the trial court did not have discretion to find in favor of Plaintiffs, in spite of the fact that in *Murray I*, the same panel remanded for

a finding of fact on that issue, noting that this was a contested issue at trial. (p. 73a).

The panel relied primarily on a so-called study by and the testimony of Anthony Naughton and ignored substantial evidence to the contrary. The panel noted that the trial court "entirely discounted this study and Naughton's testimony because there were gaps in the records analyzed." *Murray II*, (p. 9a).

But neither the trial court nor Naughton said that. Naughton said and the trial court noted that the records "were not very complete" and that Naughton had not brought any original records into the court room. (1993 Order, pp. 29a-30a). This certainly bears on the credibility of Naughton's testimony, and the trial court's opinion was based in part on credibility. (p. 34a). The trial court also noted that two former regional managers testified that during the winter time the stores were pretty much manned by the so-called "manager" and the spouse. (pp. 30a-31a). The trial court also noted, and had earlier found, that employees were pressured into falsifying records (p. 34a), thereby enhancing the credibility problem.

Rejecting inferences drawn by the trial court from those facts, the panel attempted to excuse the lack of records. (*Murray II*, p. 9a). The panel's excuse completely ignores the obligations of employers under the Act to maintain and preserve records (29 U.S.C. § 211(c)) (and to *not falsify* the records) and completely ignores Defendants' burden of proof on all factual matters related to the executive exemption.

The panel then suggested that fifteen managers testified that they "regularly" supervised two or more employees. *Id.* The panel never claimed that the alleged "managers" *customarily* and *regularly* supervised two or more employees. But even more importantly, the testimony of the so-called "managers" does not rise to the level attributed to it by the panel. Their testimony said nothing about frequency. None of them testified that they *customarily* and *regularly* supervised two or more employees.

For example Harley Blair testified in his deposition, with respect to frequency that in the winter time the hours of work of the other employees did not add up to 80 (Blair Dep. p. 19).

For further example, Carol Lewis testified that at any given time "There would be my husband and *sometimes* one other person" (emphasis supplied) (p. 14 of her deposition). This testimony was grossly misrepresented by Defendants in their brief in the Court of Appeals prior to the decision in *Murray II* when Defendants changed the word "sometimes" to "always." So much for "customarily and regularly."

While discussing testimony that only the "manager" and the manager's spouse worked during the winter months, the panel speculates that " . . . *if* those stores needed substantial part time help during busier winter days, the two-full-time-equivalent would still be satisfied. That *no doubt* explains why Naughton's study refuted some of this testimony." (Emphasis supplied) *Murray II,* (p. 11a)

Once again, the panel clearly drew speculative inferences different than the trial court's findings, which were based on substantial evidence. Ignoring this substantial evidence, the panel substituted its judgment of the facts for that of the trial court.[2]

The panel then claims, based on erroneous arithmetic, admittedly "not very complete records", some of which had been falsified, and conflicting testimony, that the so-called "managers" supervised two or more employees 98.2% of the time, stating that 1,454 store weeks were analyzed by Naughton. This is all the more remarkable when we remember that the panel held in *Murray I* that this was a contested issue. *Id.* Plaintiffs respectfully submit that the panel's numbers are erroneous when compared to the exhibit. But Exhibit A-24 substantiates Naughton's testimony that the records were "not very complete."

The panel noted that "the case focuses on the three years immediately preceding May 30, 1985." (p. 4a). The panel also noted that the Naughton study covered nearly 30 store-years of operations (p. 9a). There are 28 Plaintiffs and of course 52 weeks in each year. Three years times 52

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[2] That the panel simply drew inferences different than the trial court and substituted its judgment for that of the trial court is perhaps best demonstrated by the language of the opinion itself. The panel said *"In our view,* these were unusual circumstances . . . The district court's contrary decision is reversed." (p. 13a) (Emphasis supplied)

It is not enough to establish "clearly erroneous" to state as the panel did in *Murray II* that certain evidence "supports Stuckey's contention" (p. 10a). In fact that language supports the statement in *Murray I* that this was a contested issue.

weeks times 28 Plaintiffs (3 x 52 x 28) equals 4,368 work weeks. The 1,454 weeks referred to by the panel is less than one-third of the work weeks involved in the three year period. The nearly "30 store-years of operations" is just over one-third of the 3-year period. (28 x 3 = 84). This again supports Naughton's testimony that the records were not very complete and affects the credibility of the study, and the trial court's finding was based on credibility.

The *only* original record on this issue and in evidence in this case supports the trial court's finding and negates the testimony of Naughton and the conclusion drawn by the panel. Exhibit "B" to Plaintiffs' Trial Ex. 3 (reproduced in the Appendix at p. 152a), is a true and correct copy of the labor budget of the Little Sioux store. Exhibit B shows that during only about one-third of the weeks (11 out of 30) were there 2 or more employees being supervised.

In addition, credibility was an important issue in this case. The trial court was justified when it discredited testimony based on records that had been falsified and "were not very complete."

Other credibility problems also existed. Defendants, in addition to pressuring employees to falsify records, falsely responded to interrogatories. (1989 Order, Findings of Fact 31 and 32, p. 98a). The panel should have permitted the trial court to be the sole judge of the credibility of the witnesses as required by Federal Rule of Civil Procedure 52(a).

B(5) Exercising Discretionary Powers

On remand the trial court held that the Petitioners did not "*customarily and regularly* exercise discretionary powers" as required by 29 CFR 541.1(d). (1993 Order, p. 38a). Again the fighting issue on remand was the underlined words "customarily and regularly."

In *Murray II*, the panel then held (after remand to make a finding on that issue) that the trial court did not have any discretion to find that Plaintiffs lacked discretionary authority. (pp. 14a-16a). The panel ignored the inferences drawn by the trial court and held that the so-called "managers," as a matter of law, "customarily and regularly" exercised discretionary authority, even though the same panel noted in *Murray I* that their discretion was circumscribed or limited and remanded for a fact finding on that issue.

The panel simply substituted its judgment for that of the trial court. That substitution is evident from the language of the panel's opinion itself. On this issue, the panel said " . . . the district court took *too cramped a view* of what constitutes managerial discretion . . . " (p. 15a) (emphasis supplied). The panel substituted its "view" or judgment of the facts for that of the trial court, and rejected the inferences drawn by the trial court.

The panel in effect holds, in spite of its remand, that the trial court had no discretion to find as it did, or alternatively, that the remand permitted the trial court to find only one way even after noting in *Murray I* that Petitioners' discretion was circumscribed or limited. The

panel implies that the circumscribed and limited discretion of the Plaintiffs exceeded the discretion of the trial court.

Again on this issue Plaintiffs note that:

1. The duties of the "managers" and the admittedly non-exempt employees were essentially the same.

2. The executive exemption is to be granted only in those cases clearly and unmistakably within the terms of the exemption.

3. The exemption is to be construed narrowly against the employer. *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960).

4. The burden of proof is on the employer to establish all aspects of the executive exemption.[3]

5. The trial court is entitled to draw inferences from the facts.

6. Credibility issues are for the trial court.

7. The trial court is entitled to exercise its discretion in drawing inferences from the facts.

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[3] Finally, the panel's holdings on the "executive" exemption in both *Murray I* and *Murray II* overlooked the "salary test" requirements of 29 C.F.R. § 541.118. Defendants had the burden of proof but presented no evidence to prove that Plaintiffs were paid "on a salary basis" without deductions for sickness pursuant to 29 C.F.R. § 541.118. Uncontroverted testimony by both a regional manager (Denninger dep., pp. 49-53) and Gladys Murray (Trial Tr. I, 49) showed that such deductions were in fact made.

Since the factual tests for the "executive" exemption are in the conjunctive, the judgment of the trial court must be reinstated if the Court of Appeals was in error in setting aside any *one* of the five findings of fact. If the Court of Appeals was in error as to "primary duty" the judgment as to Russell Renecker (the only Petitioner paid more than $250 per week for some, but not all, weeks) must be substantially enhanced since the trial court treated *Murray I* as the law of the case on that issue on remand. Petitioners believe they have demonstrated that the Court of Appeals erred as to all five factual matters. But error on any one is enough to require judgment for Plaintiffs.

As noted earlier, in both *General Industries, supra* and *Icicle, supra,* the trial court made findings of fact in favor of the employer which were reversed by the Court of Appeals and this Court reversed the findings of the court of appeals.

Petitioners submit that the same standard of review should be applied by the Court of Appeals when the worker wins in the trial court as when the employer wins in the trial court.

As a matter of fact, it reasonably can be argued that there is more reason to affirm a trial court when the trial court finds in favor of the worker than when the trial court finds in favor of the employer. First of all, the burden of proof on the exemption issue is on the employer. Secondly, the FLSA is a remedial act and exemptions are to be construed narrowly against the employer. Thirdly, exemptions are to be applied only to

those clearly and unmistakably within the terms and spirit of the exemption.

Those considerations suggest that findings of fact in favor of workers on exemptions should be less readily set aside than findings of fact in favor of employers.

C. The Holdings of the Eighth Circuit also Conflict with Recent Decisions in the Fifth Circuit, the Third Circuit, and the Eleventh Circuit

Dalheim v. KDFW-TV, 918 F.2d 1220 (5th Cir. 1990), involved the 13(a)(1) exemption, as does this case. A principal issue in *Dalheim* involved the question of "primary duty," as did *Murray I.* The trial court found in favor of the workers and against the employer on the "primary duty" and the exemption.

The employer invited the Fifth Circuit to set aside the trial court's findings. The Fifth Circuit declined to do so, citing *Icicle Seafoods Inc., supra,* and *General Industries, supra.*

The Fifth Circuit noted that the Section 13(a)(1) exemption is to be "construed narrowly against the employer" and that the employer bears the burden of proof on the issue of exemption. 918 F.2d at 1224. The Fifth Circuit went on to state that the employer " . . . must demonstrate clear error to prevail." *Id.* at 1226.

The court also said that:

> " . . . the . . . exemptions claimed by (the employer) requires the district court to *infer*

> from its findings of historical fact what constitutes the employees' 'primary duty' " *Id.* at 1227 (emphasis supplied).

Under Rule 52(a) of the Federal Rules of Civil Procedure, inferences are for the trial court and can be set aside only if "clearly erroneous." See *Dalheim, supra,* where the court said at p. 1226:

> "For example, whether an employee's work is 'original and creative' in character and *whether such work is an employee's 'primary duty' are based on inferences from historical facts.* Such inferences are also reviewed for clear error" (emphasis supplied).

See also *Brock v. Mr. W. Fireworks Inc.,* 814 F.2d 1042, 1044 (5th Cir. 1987), *cert. denied,* 484 U.S. 924 (1987) where it is made plain that "inferences from facts . . . are questions of fact that we may set aside only if clearly erroneous," citing *Icicle, supra.*

The trial court's findings of fact, based upon the inferences drawn by the court, can only be set aside for clear error according to the doctrine of *Dalheim, supra.* The *Murray I* opinion did not even claim that there was clear error with respect to the findings of fact set aside in *Murray I,* nor could it. The findings of fact in our case were amply supported by the evidence as is demonstrated above.

The Eighth Circuit, in reversing the trial court as to the 13(a)(1) exemption and setting aside the inferences drawn by the trial court, has clearly used a different standard of review than the Fifth Circuit in affirming the trial court in *Dalheim, supra.*

Even more recently the Third Circuit in *Martin v. Cooper Electric Supply Co.*, 940 F.2d 896 (3rd Cir. 1991), declined to accept an employer's invitation to set aside the trial court's findings of fact in favor of workers as to a Section 13(a)(1) exemption.

In *Martin, supra,* the Third Circuit cited *Dalheim, supra, Icicle, supra, General Industries, supra,* and *Arnold, supra,* and adopted the teaching of those cases.

Additionally the Third Circuit noted that:

> " . . . if the record is unclear as to some exemption requirement, the employer will be held not to have satisfied its burden." (emphasis supplied) 940 F.2d at 900.

Similarly, in *Brock v. Norman's Country Market, Inc.*, 835 F.2d 823 (11th Cir. 1988), *cert. denied*, 487 U.S. 1205 (1988) the Eleventh Circuit declined the employer's invitation to overturn the trial court's findings of fact in favor of the workers.

In that case the trial court, like the trial court here, had stated:

> "Because Defendants have *failed to sustain their burden of proving that the primary duty of these employees was the management of their departments,* the court must conclude that they are not exempt as executives under either of the regulation tests" (emphasis supplied) (p. 826).

The Eleventh Circuit noted that:

> "The burden of proving the applicability of the executive exemption is upon the Defendant. The exemption is to be applied only to those clearly

and unmistakably within the terms and spirit of the exemption" (p. 826).

and then went on to hold that:

"It has been well settled that the District Court has the opportunity to observe the witnesses and their demeanor, and is, therefore in the best position to make credibility[4] determinations, subject only to the clearly erroneous rule of Federal Rule of Civil Procedure 52(a)." (p. 826).

The Eleventh Circuit panel concluded that:

"After carefully reviewing the record, we agree with the district court's determination. The employees in questions were nothing more than *'working foremen'*. Although each of them may have had a duty which is normally recognized as that of a manager's responsibility, looking at each one individually and at the actual work performed, we cannot say they qualified as a *'bona fide* executive' ." (emphasis supplied) *Id.*

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[4] Respondents' credibility was seriously at issue at trial. In response to interrogatories Respondents had claimed only four previous investigations under FLSA. Later after Plaintiffs had made Freedom of Information requests as to previous investigations, and in response to Requests for Admissions, Respondents admitted numerous additional investigations, claims, payments, and promises to comply with FLSA. (Findings of Fact 31 and 32, p. 98a).

D. The Eighth Circuit has so far Departed from the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of this Court's Power of Supervision.

Rule 10.1(a) of the Rules of the Supreme Court of the United States suggests as one of the reasons for the grant of certiorari:

> "When a United States Court of Appeals has . . . so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision."

Petitioners herein submit that the action of the three-judge panel of the Eighth Circuit cries out for the exercise of this Court's power of supervision.

The decisions of the panel in *Murray I* and *Murray II* are not only in conflict with previous decisions of this Court (Section B of this Petition) and in conflict with other courts of appeal (Section C of this Petition). The decision of the panel has also departed from the accepted and usual course of judicial proceedings.

To the best of Petitioners' knowledge there have been no reported cases where a Court of Appeals has overturned findings of fact by the trial court in favor of workers as to "primary duty" with respect to employees making less than $250 per week or failure to sustain the burden of proof as to the "executive" exemption. This is easily understandable in light of the burden of proof, the remedial nature of the statute, strict construction of the Act *against* the employer, and the teaching of *Icicle, supra,* and *General Industries, supra.*

Petitioners are even more confident that there have been no reported decisions in which a Court of Appeals has set aside *five* separate findings of fact, letting stand findings of fact conflicting with the new findings by the Court of Appeals. As heretofore noted any *one* of the findings erroneously set aside would justify the judgment of the trial court.

Petitioners respectfully submit then that the three-judge panel of the Eighth Circuit, under those circumstances, has dramatically departed from the accepted and usual course of judicial proceedings. Petitioners further respectfully submit that those circumstances call for an exercise of this Court's power of supervision.

CONCLUSION

The standard of review should not be different depending on whether the employer or the worker prevailed in the trial court.[5] Nor should the standard of review be different in the Eighth Circuit than in the Fifth Circuit, the Third Circuit, or the Eleventh Circuit. The Eighth Circuit's action so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

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[5] This is a case involving employees at the lowest end of the economic spectrum – those being paid less than $250 per week. The act was designed to protect those on the lowest end of the economic spectrum. This is not a case involving highly paid employees as in *Freeman v. National Broadcasting Co., Inc.*, 846 F.Supp. 1109 (S.D.N.Y. 1993).

For those reasons Petitioners respectfully pray that this Petition for a Writ of Certiorari should be granted. Petitioners pray further pursuant to Rule 16.1 of the Rules of the Supreme Court of the United States, that this Court order that all five findings of fact of the trial court be reinstated, that the trial courts' judgment of April 15, 1994 be reinstated, and that the matter be remanded to the trial court for recomputation of damages to Russell Renecker.

DATED at Sioux City, Iowa, July 6, 1995.

Respectfully submitted,

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On the Petition

APPENDIX A

United States Court of Appeals

for the Eighth Circuit

Nos. 94-2167 and 94-2172

Gladys Murray, for herself and all others similarly situated; consent to become parties plaintiff: Floyd Caskey; Allan Christiansen; Donald Scott; Deborah L. Hoyt; Russell C. Renecker; Eugene A. Rutledge; Lawrence B. Taylor; Warren Kajander; Jeannette (Petrimoulx) Arbuckle; Kinney Bryant; Carol S. Lewis; Harley Blair; Thomas Miller; Sandra L. Crist; Larry Brown; Randy Bushnell; Bobbie Cockrell; Mary T. Cope; Stanley Dixon; Thomas Foster; Edward Geisenheimer; Rae Jean Hamilton; Loren Jacoby; Donald Phillips; Joy M. Powers; Arthur Stotts; David Tompkins,	*	Appeals from the United States District Court for the Northern District of Iowa.
Plaintiffs/Appellees/ Cross-Appellants,	*	
Sidney Murray; Christine Christiansen; Roger D. Hoyt; Carol Renecker; Bettye Bryant; James L. Lewis; Joyce Tompkins; Veralyn Blair; Sandra L. Crist, in her capacity as executrix of the estate	*	

of Kenneth L. Crist; Rita Miller; Michael Hamilton; Anna M. Foster; Joni Bushnell; Lois Louise Phillips; Adrienne Geisenheimer; Sharon Jacoby; Bonnie Stotts; Linda M. Brown; Bev Caskey; Michelle Scott; Kevin Murray; Joylene Taylor; William Pohlman; Robert Pohlman; Nancy Pohlman; Robert Kajander; Tony Tompkins; Tracy Tompkins; Georgia Phillips; Tammy Moore; Bonita Dixon; Charles Brown,

Plaintiffs,

v.

Stuckey's, Inc.; Pet, Incorporated,

Defendants/Appellants/
Cross-Appellees.

Submitted: December 13, 1994

Filed: March 20, 1995

Before BOWMAN, MAGILL, and LOKEN, Circuit Judges

LOKEN, Circuit Judge.

"Bona fide executive" employees are exempt from the overtime requirements of the Fair Labor Standards Act (FLSA). *See* 29 U.S.C. § 213(a)(1). In *Murray v. Stuckey's, Inc.*, 939 F.2d 614 (8th Cir. 1991), *cert. denied*, 502 U.S. 1073 (1992) (*Murray I*), we reversed a damage award

in favor of former managers of Stuckey's roadside stores. We held that the district court erred in concluding that the managers did not meet two of the Department of Labor's criteria which define exempt executive employees – having management as their primary duty, and being solely in charge of a physically separated branch establishment. *See* 29 C.F.R. § 541.1(a), (e).

On remand, after again reviewing the record from its non-jury trial, the district court concluded that the managers did not meet two other criteria specified in the regulations – that an exempt executive must regularly supervise two or more other employees and must regularly exercise discretionary powers. *See* 29 C.F.R. § 541.1(b), (d). The court recalculated compensatory and liquidated damages, awarded additional attorney's fees, and entered judgment in favor of the plaintiff managers. Stuckey's, Inc., and its parent, Pet, Incorporated ("Stuckey's"), again appeal, raising a variety of issues. We hold that the managers were exempt executive employees and therefore reverse.

I. Background.

We will only briefly restate the background facts summarized in *Murray I*. Before it failed, Stuckey's operated combination gas stations, restaurants, and convenience stores, primarily in rural locations on interstate highways. Each store's resident manager was paid a weekly salary plus potential bonuses. If the manager was married, Stuckey's hired the spouse as an hourly employee at just above the minimum wage. Gladys and Sidney Murray are former employees at Stuckey's stores

in Randall and Little Sioux, Iowa. On May 30, 1985, the Murrays commenced this action, alleging that Stuckey's had failed to compensate managers and spouses for overtime as required by the FLSA. Other managers and hourly employees filed written consents and joined the suit. *See* 29 U.S.C. § 216(b). Because of the applicable statute of limitations, the case focuses on the three years immediately preceding May 30, 1985, a period in which Stuckey's was unsuccessfully attempting to turn around its unprofitable operations.

The FLSA requires that covered employees be paid 1½ times their regular hourly rate for hours worked in excess of forty per week. *See* 29 U.S.C. § 207(a)(1). This requirement does not apply to "any employee employed in a bona fide executive . . . capacity . . . (as such terms are defined and delimited from time to time by regulations of the Secretary [of Labor])." 29 U.S.C. § 213(a)(1). The Secretary first promulgated regulations to "define and delimit" the executive employee exemption in October 1938. *See* Annot., 151 A.L.R. 1089, 1089 n.1 (1944). The current regulations define an "employee employed in a bona fide executive capacity" as one:

> (a) whose "primary duty" consists of the management of a recognized subdivision of the employer's enterprise; and
>
> (b) who "customarily and regularly directs the work of two or more other employees"; and
>
> (c) who "has the authority to hire or fire other employees" or who makes recommendations as to hiring, firing, and promoting that are "given particular weight"; and

> (d) who "customarily and regularly exercises discretionary powers"; and
>
> (e) who devotes less than 40 percent of the work week to nonexempt activities, or "is in sole charge of . . . a physically separated branch establishment."

29 C.F.R. § 541.1.[1] In *Murray I*, we resolved the "primary duty" and "sole charge" issues in favor of Stuckey's. Because the managers concede that they had authority to hire and fire other employees, we are now concerned only with criteria (b) and (d), whether the managers "customarily and regularly" supervised at least two other employees and exercised discretionary powers. Stuckey's has the burden of proof regarding these issues. *See Walling v. General Indus. Co.*, 330 U.S. 545, 547-48 (1947).

II. Supervising Two or More Employees.

Until 1949, the Secretary's regulations required only that an exempt executive employee "customarily and regularly directs the work of other employees." *General Industries*, 330 U.S. at 548 n.6. That year, without explanation, the Department added the "two or more other employees" language presently found in 29 C.F.R. § 541.1(b). *See* 14 Fed. Reg. 5573, 14 Fed. Reg. 7705, 7706 (1949). A companion regulation clarified that an exempt

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[1] This is the so-called "long test." Employees who earn at least $250 per week are exempt executives if they meet the first two of these requirements, the so-called "short test." 29 C.F.R. § 541.1(f). Some of the Stuckey's managers fell into each earnings category. The distinction does not affect this appeal.

executive must supervise the equivalent of two or more full-time employees:

> **Two or more other employees.**
>
> (a) An employee will qualify as an "executive" under § 541.1 only if he customarily and regularly supervises at least two full-time employees or the equivalent. For example, if the "executive" supervises one full-time and two part-time employees of whom one works mornings and one, afternoons; or four part-time employees, two of whom work mornings and two afternoons, this requirement would be met.

14 Fed. Reg. 7730, 7731-32 (1949), codified at 29 C.F.R. § 541.105(a).

In *Murray I* we commented briefly on the two-employee issue in remanding the store managers' claims to the district court:

> The district court did not reach this issue. The evidence included Stuckey's labor budget documents, which appear to reflect that all Stuckey's store managers supervised the equivalent of at least two other full-time employees at all times. Since the district court concluded that these labor budgets understated the labor needed to run the stores, it seems likely that Stuckey's met its burden of proof as to this factor. However, this was a contested issue at trial, and it appears that the district court deferred rulings on the admissibility of other evidence Stuckey's submitted on the question. Under these circumstances, it would be inappropriate for us to resolve this issue in the first instance.

939 F.2d at 620. On remand, neither side supplemented the trial record, and the district court did not exclude any trial evidence. The court held that Stuckey's failed to meet its burden of proof on this issue because it relied upon an incomplete analysis of payroll records, because there was testimony that only two people ran some low-volume stores in the winter, and because Stuckey's "did not submit direct evidence on the volume of each store." Stuckey's contends that this decision reflects errors of fact and law. Unlike the record before us in *Murray I*, Stuckey's has now provided the full trial record for our consideration of this issue.

There was undisputed trial testimony that Stuckey's hired a new management team in early 1982, the start of the period at issue in this lawsuit. Charged with the task of making Stuckey's profitable, the new Senior Vice President of Store Operations, George Davis, developed new weekly labor schedules for the various stores. These schedules recommended the hours of operation and the work force for each day of the week, taking into account normal customer traffic flows. The schedules recommended a smaller work force for stores with lower sales volumes. In most parts of the country, the schedules also recommended shorter hours of operation and correspondingly reduced labor expense in the winter months, when there is less highway traffic.

In 1982 and 1983, the labor schedule with the *smallest* recommended work force was the October 28, 1982, winter schedule for stores having up to $5,000 per week in total sales. That schedule recommended store hours of 7:00 a.m. to 6:00 p.m., seven days a week, staffed by the manager working sixty hours per week, the manager's

spouse working forty hours, and five part-time employees working a total of sixty-seven additional hours per week.[2] In January 1984, Davis circulated a new schedule for stores electing to close on Mondays that winter. It showed the manager and spouse at sixty and forty hours per week, and three part-time employees at 38-40 hours. By contrast, the January 1984 schedule for small-volume stores remaining open on winter Mondays called for four part-time employees working sixty hours per week in addition to the manager and his or her spouse.

The parties agree that the manager's spouse was an hourly employee supervised by the store manager. Thus, as we noted in *Murray I*, if Davis's labor schedules were followed, all Stuckey's store managers supervised the equivalent of at least two other full-time employees at all times.

Most of plaintiffs' trial evidence was aimed at proving that Davis's labor schedules significantly *understated* the work force needed to operate Stuckey's stores, forcing the managers' spouses to work long hours "off the clock" without overtime pay. All trial witnesses agreed that two employees were needed to operate a store; plaintiffs' witnesses opined that three employees were needed to operate a store properly. At plaintiffs' urging, the district court in its first post-trial decision found "that there were

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[2] It is clear from the regulations that this criterion is met if an employee supervises several part-time employees whose total hours of work are the equivalent of two full-time employees. *See* 29 C.F.R. § 541.105(a); *Marshall v. Hudson Stations, Inc.*, 24 Wage & Hour Cas. (BNA) 260 (D. Kan. 1979).

not sufficient hours projected into the labor schedule." Based upon that finding, the court made substantial overtime awards to the hourly plaintiffs, and we affirmed those awards in *Murray I*. On remand, however, the district court simply ignored this essential aspect of the case in addressing the two-or-more-employees issue.

Stuckey's permitted individual store managers to deviate from the labor schedules with the approval of their regional managers. Therefore, in an effort to provide more specific evidence on this issue, Stuckey's analyzed voluminous payroll records from many of the stores at which the plaintiff managers worked during the 1982-1985 period. Anthony Naughton, a Stuckey's accountant, summarized the results of this study at trial. A total of 1454 store weeks were analyzed. In 1428 of those weeks, or 98.2% of the total, the store manager supervised two or more other employees who worked more than eighty total hours. In eleven of the remaining weeks, the manager supervised two or more employees who worked 75-80 hours. In the remaining fifteen weeks, the manager supervised two or more employees who worked only 61-74 hours.

The district court entirely discounted this study and Naughton's testimony because there were gaps in the records analyzed. But the study included a substantial volume of data, nearly thirty store-years of operations. All Stuckey's stores had closed long before this case was tried, so it is not surprising that complete store records were unavailable. Stuckey's directed this study at stores the plaintiffs had managed. Plaintiffs did not challenge the study's methodology nor impeach Naughton's trial

testimony. We conclude that the district court erred in rejecting this highly relevant evidence.

Many plaintiff managers testified briefly on this issue. For example, manager Russell Renecker admitted that he supervised as many as eight or ten employees, and never fewer than two, during the period in question. The district court credited this testimony, but then found, "There were other Russell Reneckers out there but the evidence was not presented to this court." That finding is clearly erroneous. We have read the testimony of the many plaintiff managers who testified by deposition, testimony that was not in the record on appeal in *Murray I*. Fifteen other managers testified that they regularly supervised two or more employees who worked more than eighty hours per week.[3] In most cases, this testimony is confirmed by the Naughton study. The other twelve managers[4] did not testify directly on this issue, but their descriptions of store operating hours and employees supervised, combined with the Naughton study of their stores, support Stuckey's contention that they, too, regularly supervised the equivalent of two or more full-time employees.

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[3] Harley Blair, Larry Brown, Kinney Bryant, Randy Bushnell, Floyd Caskey, Allan Christiansen, Mary Cope, Thomas Foster, Deborah Hoyt, Warren Kajander, Thomas Miller, Jeannette Arbuckle, Eugene Rutledge, Donald Scott, Lawrence Taylor.

[4] Gladys Murray, Carol Lewis, Bobbie Cockrell, Sandra Crist, Stanley Dixon, Edward Geisenheimer, Rae Jean Hamilton, Loren Jacoby, Donald Phillips, Joy Powers, Arthur Stotts, and David Tompkins.

The remaining evidence on this issue consisted of testimony that some Stuckey's stores were so unsuccessful that only the manager and spouse worked some days during the winter. Of course, if those stores needed substantial part-time help during busier winter days, the two-full-time-equivalent criterion would still be satisfied. That no doubt explains why Naughton's study refuted some of this testimony. Nonetheless, it is to some extent credible, and Naughton's study confirmed that there were some weeks in which some Stuckey's store managers did not supervise two full-time-equivalent employees. However, for the following reasons, we conclude that this evidence does not refute Stuckey's proof that its store managers "customarily and regularly" met this criterion.

First, as the regulations elsewhere provide, customarily and regularly "signifies a frequency which must be greater than occasional but which, of course, may be less than constant." 29 C.F.R. § 541.107(b). We disagree with the comment that "76 percent of the time . . . falls short of 'regular and customary' " in *Secretary of Labor v. Daylight Dairy Prods., Inc.*, 779 F.2d 784, 788 (1st Cir. 1985). But in any event, Stuckey's study of a large sample showed that store managers supervised at least two or more employees who worked eighty hours per week 98.2% of the time. That is "customarily and regularly" by any definition.

Second, although forty hours per week is generally the equivalent of a full-time employee, the Department of Labor in applying this regulation recognizes that this is not a rigid standard. Paragraph 22c00 of the Wage and

Hour Division, U.S. Department of Labor, *Field Operations Handbook* states in part:

> Two full-time employees or the equivalent within the meaning of Reg 541.105(a) is generally considered to mean 80 hours of work by subordinate employees. . . . Unusual circumstances might occasionally justify lower standards. . . . The determination as to whether an employee customarily and regularly supervises other employees within the meaning of Reg 541.1(b) depends on all the facts and circumstances.[5]

In our view, we should not interpret this regulation more rigidly than the Department does in enforcing it. Courts undermine the statute when they construe regulations more inflexibly than the enforcing agency.

Finally, even if the Department considered two full-time equivalent employees an inflexible requirement, we would not rigidly apply it to this case. The Department's only published justification for this rule is the statement in the regulations, "It has been the experience of the divisions that a supervisor of a[s] few as two employees usually performs nonexempt work in excess of the general 20-percent tolerance provided in § 541.1." 29 C.F.R. § 541.105(c). That justification is inapplicable here because employees in sole charge of a physically separate branch establishment, like Stuckey's store managers, are

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[5] Counsel included this portion of the Field Operations Handbook in the record on appeal. Inquiring at our request, an Eighth Circuit librarian was told by the Department that the full Handbook is obtainable only by a formal Freedom of Information Act demand.

exempt from the twenty-percent requirement. *See* 29 C.F.R. § 541.1(e).

Stuckey's adopted nationwide labor schedules recommending that its managers employ more than two full-time employees per week. Plaintiffs' witnesses testified, and the district court found, that these schedules were, if anything, too lean. The company then fell on hard times and, in the years just prior to its failure, some of the managers testified that they operated small rural stores on a skeletal basis in the winter, rather than closing altogether. In our view, these were unusual circumstances that do not alter the fact that Stuckey's store managers customarily and regularly supervised the work of at least two other full-time equivalent employees. The district court's contrary decision is reversed.

III. Exercising Discretionary Powers.

To qualify for the executive exemption, Stuckey's must prove that its store managers "customarily and regularly exercise[d] discretionary powers." 29 C.F.R. § 541.1(d). The regulations at 29 C.F.R. § 541.107 further refine this criterion:

> **Discretionary powers.**
>
> (a) . . . A person whose work is so completely routinized that he has no discretion does not qualify for exemption.
>
> (b) The phrase "customarily and regularly" signifies a frequency which must be greater than occasional but which, of course, may be less than constant. The requirement will be met by the employee who normally and

> recurrently is called upon to exercise and does exercise discretionary powers in the day-to-day performance of his duties. The requirement is not met by the occasional exercise of discretionary powers.

In *Murray I*, we concluded: "Although the record seems clear that store managers . . . were 'normally and recurrently . . . called upon to exercise . . . discretionary powers in the day-to-day performance of [their] duties,' 29 C.F.R. § 541.107(b), we again will remand to the district court for initial consideration of [this issue]." 939 F.2d at 620.

On remand, the district court found that "[w]hat little discretion the managers did exercise on a day-to-day basis was so circumscribed as to be no discretion at all." This finding was based on the testimony of various managers that their authority was limited by company policies and training manuals, by the recommended labor schedules, and by the need to obtain the regional manager's approval to fire an employee, to alter the company-prescribed store inventory, to make repairs costing more than $25.00, and so forth. Thus, concluded the district court, the manager's "work is so completely routinized that he has no discretion" within the meaning of 29 C.F.R. § 541.107(a).

In *Murray I*, we determined that management was the store managers' primary duty and that they were in sole charge of the isolated stores. At one level, therefore, these managers clearly exercised constant discretion. They were responsible for the initial handling of any emergency that threatened these significant company assets, such as fire, theft, vandalism, sudden employee absences,

and so forth. The fact that such emergencies did not often occur does not justify the district court's complete refusal to recognize this aspect of the managers' responsibilities. An employer such as Stuckey's must have at each physically separate facility one employee with the mandate to exercise discretion to handle such emergencies as part of "the day-to-day performance of his [or her] duties." 29 C.F.R. § 541.107(b).

Even ignoring emergency situations and focusing on more normal day-to-day activities, we conclude that the district court took too cramped a view of what constitutes managerial discretion, resulting in clearly erroneous findings on this issue. Most if not all nationwide companies with multiple outlets establish standardized procedures and policies to guide individual store managers. This practice may circumscribe but it does not eliminate the discretion of the on-site manager of an isolated store who is responsible for day-to-day operations. Similarly, active supervision and periodic visits by a regional manager do not eliminate the day-to-day discretion of the on-site store manager. *See Donovan v. Waffle House, Inc.*, 26 Wage & Hour Cas. (BNA) 868, 874 (N.D. Ga. 1983); *Marshall v. Saliy Beauty Co.*, 25 Wage & Hour Cas. (BNA) 672 (E.D. La. 1982).

In this case, various store managers testified that they hired other employees; scheduled employee work hours; trained and disciplined other employees; ordered store inventories; and handled customer complaints under Stuckey's general "the customer is always right" policy. In considering whether branch store managers were exempt executive employees, the court in *Sally*

Beauty Co., 25 Wage & Hour Cas. (BNA) at 673, concluded:

> The store manager's position entails a variety of daily administrative and managerial duties. Opening and closing the store falls within the managers' responsibility, in addition to their discretionary functions in scheduling employee hours, customer relations, and ordering merchandise. The exclusive authority to grant discounts and markdowns, extend credit and approve checks, and to resolve customer complaints is vested with the managers. Inventory maintenance and display techniques constitute another aspect of the manager's job. The aforesaid duties thus require the managers to customarily and regularly exercise discretionary powers within the strictures of 29 C.F.R. §§ 541.1(d) and 541.107.

We agree with this interpretation of the regulations. Therefore, the district court's finding that Stuckey's failed to prove that the store managers customarily and regularly exercised discretionary powers is clearly erroneous.

IV. Conclusion.

The plaintiff store managers were bona fide executive employees exempt from the FLSA's maximum hours provisions. The judgment of the district court in favor of these plaintiffs is reversed and the case is remanded with instructions to dismiss their complaints. The district court's award of attorney's fees is vacated. No fees may be awarded for work on the store managers' claims. Although work on the hourly employees' claims should have been substantially completed prior to our decision

in *Murray I*, on remand plaintiffs may petition the district court for an additional fee award if any work that was solely on behalf of the hourly employees was included in the fee award that we now vacate. Plaintiffs' cross appeal is dismissed. The costs of both appeals are taxed in favor of Stuckey's.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS

for the Eighth Circuit

No. 94-2167/2172NISC

Gladys Murray, et al.,	*	
	*	
Appellees,	*	Order Denying Petition
	*	for Rehearing and
v.	*	Suggestion for Rehearing
	*	En Banc
Stuckey's Inc., et al.,	*	
	*	
Appellants.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

April 25, 1995

Order Entered at the Direction of the Court:
/s/ Michael E. Gens
Clerk, U.S. Court of Appeals, Eight Circuit

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

SIDNEY MURRAY and GLADYS MURRAY, on behalf of themselves and all others similarly situated, Plaintiffs, vs. STUCKEY'S, INC. and PET INCORPORATED, Defendants.	No. C 85-4085 MEMORANDUM OPINION AND ORDER

This matter comes before the court on defendants' motion for summary judgment following a decision by the Eighth Circuit Court of Appeals reversing and remanding portions of the above entitled matter to this court. Additional hearings were held and the parties submitted proposed findings of fact and conclusions of law for the court's consideration. Despite the fact that the court requested further evidence, the parties have agreed that no further evidence need be submitted on the remaining issues and have requested this court to rule. After considering the parties arguments, both oral and written, the court finds that the defendants are not entitled to the "executive exemption" for the store "managers." The court also adheres to its previous position regarding the applicable statute of limitations and the finding that plaintiffs are entitled to liquidated damages.

In addition, after further consideration, the court finds that the appropriate method for calculating plaintiff "managers" hourly rate of pay is by dividing the weekly rate by forty (40) rather than sixty (60) as originally found by this court.

I. FACTS[1]

The facts in this case have been set out repeatedly in previous orders of this court and in the decision of the Court of Appeals for the Eighth Circuit.[2] On May 31, 1985, plaintiffs, former "managers" and "hourly employees" of various Stuckey's stores throughout the country, commenced this action under the Fair Labor Standards Act, (FLSA), 29 U.S.C. § 201 *et seq.*, seeking to recover additional overtime compensation and compensation for hours claimed to have been worked "off the clock." The matter was tried to the court from February 21, 1989 through February 25, 1989. One of the main issues in the case was whether the "managers" of the Stuckey's stores were exempt under FLSA's overtime requirements under Section 13(a)(1) of the Act, 29 U.S.C. § 213(a)(1). The Secretary of Labor's regulations provide a test for determining whether or not managers are exempt

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[1] This court issued a 35 page memorandum of law and order in 1989 which contained extensive findings of fact and conclusions of law. Those findings of fact and conclusions of law are incorporated in this opinion as if fully set forth herein, to the extent that they were not overturned by the Eighth Circuit Court of Appeals.

[2] *See Murray v. Stuckey's Inc.*, 939 F.2d 614 (8th Cir. 1991).

under the FLSA. The "test," codified at 29 C.F.R. § 541.1 provides:

> The term "employee employed in a bona-fide executive . . . capacity" in section 13(a)(1) of the Act shall mean any employee:
>
> (a) whose primary duty constitutes the management of the enterprise in which he is employed or of a customarily recognized department of a subdivision thereof; and
>
> (b) who customarily and regularly directs the work of two or more other employees therein; and
>
> (c) who has the authority to hire and fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and
>
> (d) who customarily and regularly exercises discretionary powers; and
>
> (e) who does not devote more than 20%, or, in the case of an employee of a retail or service establishment who does not devote as much as 40%, of his hours of work in the work week to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (d) of this subsection; *provided*, that this paragraph shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment, or who owns at least a 20% interest in the enterprise in which he is employed; and

> (f) who is compensated for his services on a salary basis at a rate of not less than $155.00 per week (or $130.00 per week, if employed by other than the federal government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging or other facilities: *provided*, that an employee who is compensated on a salary basis at a rate of not less than $250.00 per week (or $200.00 per week, if employed by other than the federal government in Puerto Rico, the Virgin Islands or American Samoa), exclusive of board, lodging, or other facilities, and whose primary duty consists of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein, shall be deemed to meet all the requirements of this section.

As noted by this court in its order of July 17, 1989, it was necessary for the court to apply both the "long test," subparts (a) through (e), and the "short test," subsection (f), in determining whether managers in this case were exempt under the FLSA.[3] The court found that under either test, it was important to determine if an employee's "primary duty" was management. Based on the factors

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[3] The "long test" applies to those earning less than $250.00 per week and the "short test" applies to those earning more than $250.00 per week. It is undisputed, as found in this court's earlier order, that all managers of Stuckey's stores were paid at least $155.00 per week.

set forth in 29 C.F.R. § 541.103,[4] this court determined that the facts in this case clearly warranted a finding that the manager plaintiffs' primary duties were not management, but rather, Stuckey's regional managers served as the "real managers" of their stores. The court also determined that the defendants failed to establish that they were entitled to the exemption under the "sole charge" exception as set forth in 29 C.F.R. § 541.1(e). Because defendants did not meet their burden with respect to the "primary duty" part of either the short test or the long test or the sole charge exception, the court determined

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[4] Section 541.103 reads:

A determination of whether an employee has management as his primary duty must be based on all the facts in a particular case. The amount of time spent in the performance of the managerial duties is a useful guide in determining whether management is the primary duty of an employee. In the ordinary case it may be taken as a good rule of thumb that primary duty means the major part, or over 50%, of the employee's time. Thus, an employee who spends over 50% of his time in management would have management as his primary duty. Time alone, however, is not the sole test, and in situations where the employee does not spend over 50% of his time in managerial duties, he might nevertheless have management as his primary duty if the other pertinent factors support such a conclusion. Some of these pertinent factors are the relative importance of the managerial duties as compared with other types of duties, the frequency with which the employee exercises discretionary powers, his relative freedom from supervision, and the relationship between his salary and the wages paid other employees for the kind of nonexempt work performed by the supervisor.

they were not entitled to the "bona fide executive" exemption under Section 13(a)(1) of the Act.

On appeal, a three judge panel of the Eighth Circuit Court of Appeals determined that this court erred in ruling that Stuckey's failed to prove that the plaintiff store managers' primary duty was management for purposes of the first part of the "bona fide executive" test, 29 C.F.R. § 541.1(a). *Murray v. Stuckey's Inc.*, 939 F.2d 614, 620 (8th Cir. 1991). In addition, the Eighth Circuit determined that the Stuckey's store managers clearly fell within the "sole charge" criterion of 29 C.F.R. § 541.1(e), contrary to this court's ruling. *Id.* The Court of Appeals noted that this court did not reach the issue of whether the store managers regularly and customarily supervised two or more employees, nor did this court reach the two other "long test" factors; i.e. whether the managers had authority to hire and fire and whether they regularly and customarily exercised discretionary authority.[5] Therefore, the Court of Appeals remanded the case to this court for further consideration of those issues. *Id.*

II. DISCUSSION

The Court of Appeals decision remanded three main issues for further consideration by this court:

(1) Whether the Stuckey's "managers" regularly and customarily directed the work of two or more employees;

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[5] This court did not reach those issues in its original order because the test is conjunctive. If the defendants fail to satisfy even one of the factors, they are not entitled to the exemption.

(2) Whether the Stuckey's "managers" had the authority to hire or fire other employees or make recommendations as to hiring, firing, and promotion that were given particular weight; and

(3) Whether the Stuckey's "managers" regularly and customarily exercised discretionary powers.

The plaintiffs concede that the defendants have probably met their burden with respect to the second of these issues; i.e. that the "managers" had the authority to hire or fire other employees or make recommendations to that effect. The plaintiffs concede this issue because, unlike the other sections which require "regular and customary" exercise of the specific authority, the section requiring hire and fire authority does not. Therefore, the court will consider that this issue has been proved in favor of defendants. It is then necessary for this court to address the other two remaining factors in the test for the bona fide executive exemption.

A. Supervision of Two or More Employees.

Both the "short test" and the "long test" require that the defendants prove that each store manager customarily and regularly supervised two or more employees. If the defendants fail on their burden of proving this factor with respect to any one store manager, they are not entitled to the executive exemption for that employee. There was little or no relevant testimony concerning this issue presented by the defendants at the original trial and despite a clear request for more evidence the defendants either don't have it or made a calculated choice not to

submit it on the mistaken belief they could prevail anyway because of comments made by the Circuit Court.

In the "Interpretations," at 29 C.F.R. § 541.105(a), directing the work of two or more other employees is interpreted to mean "customarily and regularly supervises at least two full-time employees or the equivalent." According to this section, the requirement is met if the "executive" supervises one full-time and two part-time employees of whom one works morning and one afternoons. It is also satisfied if there are four part-time employees, two of whom work mornings and two afternoons. 29 C.F.R. § 541.105(a). The defendants contend that there is substantial evidence in the record to demonstrate that managers of stores customarily and regularly supervised two or more full-time employees or their equivalent, namely the testimony of the managers and their families; the testimony of Anthony Naughton, who reviewed payroll records; and, the testimony of George Davis, who supplied the labor schedules. In addition, defendants contend that the above requirements are met when a manager supervises two or more employees, who, *in any combination* work a total of 80 or more hours in a week. *Secretary of Labor v. Daylight Dairy Products, Inc.*, 779 F.2d 784 (1st Cir. 1985). In other words, defendants contend that if the manager was supervising his or her spouse, who worked 60 hours, and one other part-time employee who worked 21 hours, the manager would be supervising "two or more full-time employees" within the meaning of the regulation because he or she would be supervising two people, who in combination, worked more than 80 hours.

The court disagrees with defendants' interpretation of this regulation and of the *Daylight Dairy* decision. The regulation clearly requires the supervision of *two or more full-time employees or the equivalent*. The interpretations provide that the manager can supervise one full-time employee and two part-time employees or four part-time employees to satisfy this requirement. This regulation cannot, however, be read to allow the supervision of one full-time employee who is also considered a part-time employee because he works overtime, and one other part-time employee. Taken to its logical conclusion, the defendants' position would allow the managers to qualify for the exemption if they supervised their spouses for 79 hours and one other employee for at least 1 hour. This court does not believe that such a result was intended by this regulation. Nor does the court feel that the *Daylight Dairy* case stands for such a broad proposition. The *Daylight Dairy* court said:

> The equivalent of two full-time employees working 40-hour weeks is any number of part-time employees, as long as the total number of hours supervised exceeds 80. For example, four persons each working 25 hours per week satisfy the requirement, because the hours supervised total 100.

Secretary of Labor v. Daylight Dairy Products, Inc., 779 F.2d 784, 787 (1st Cir. 1985). This holding does not encompass counting a spouse as one full-time and one part-time employee simply because he works overtime. Therefore, in those instances that defendants rely on a spouse and one other part-time employee to assert that they have

satisfied the supervising two or more employees requirement, the court finds that they have not met their burden of proof. As has been stated in *Brock v. Norman's Country Market, Inc.*:

> The burden of proving the applicability of the executive exemption is upon the defendant. The exemption is to be applied only to those clearly and unmistakably within the terms and *spirit* of the exemption.

Brock v. Norman's Country Market, Inc., 835 F.2d 823, 826 (11th Cir.), *cert. denied*, 108 S.Ct. 2845 (1988) (emphasis added). The Eighth Circuit followed this same sentiment when it stated that "[a]n employer who asserts it is exempt from the Act 'has the burden of establishing the exemption affirmatively and clearly.' " *Donovan v. Williams Chemical Co., Inc.*, 682 F.2d 185 (8th Cir. 1982) (citations omitted).

Not only have defendants failed in their burden of proof in those instances where they rely on a spouse and one other part-time employee to meet the "two or more full-time employee" requirement, they have also failed in their burden with respect to most other "managers." Keeping in mind that the burden of proving the applicability of the exemption is on the defendants and that the exemption is to be applied only in those cases clearly and unmistakably within the terms and spirit of the exemption, this court notes that the proof is insufficient in this case. The defendants rely on the testimony of the "managers" as to the hours worked by other employees and their spouses; the testimony of Anthony J. Naughton who summarized the results of a review of the existing payroll records; and the testimony of George Davis who

testified regarding the labor schedules he developed for use at Stuckey's. While this court is cognizant of the comment made by the Eighth Circuit on appeal that "it seems likely that Stuckey's met its burden of proof as to this factor," this court also notes that the record transmitted on appeal "did not contain many of the relevant portions of the trial record, including the pleadings that set forth the manner in which each plaintiff's damages were calculated, the trial testimony of over 40 witnesses who testified by deposition, and many trial exhibits." *Murray v. Stuckey's*, 939 F.2d 614, 622 n.3 (8th Cir. 1991).

Defendants' reliance on the testimony of Anthony J. Naughton and the existing payroll records is misplaced. At several points in Mr. Naughton's testimony he admitted that the payroll records were not very complete. For example, on direct examination by the defendants' attorney the following exchange took place:

> Q. In connection with that, were you asked to look at the number of hours employees worked and the number of people supervised at the store?
>
> A. Yes, they were.
>
> Q. And did you have very complete records?
>
> A. No. They were not very complete.
>
> Q. And were these all the records from the Stuckey's stores of the list of people that you were asked to do?
>
> A. Yes. It was the records that we could find.

(Tr. IV. 731:13-21). In addition, the following exchange took place between the plaintiffs' attorney and Mr. Naughton:

> Mr. Nymann: Have you brought any of the original records that you are referring to into this courtroom?
>
> The Witness: Yes, there are some.
>
> Mr. Nymann: The original records?
>
> The Witness: Not the source documents, no. These are summary computer reports.
>
> Mr. Nymann: What you brought in are your own summaries from –
>
> The Witness: Correct.
>
> Mr. Nymann: And those are the records you found not to be complete?
>
> The Witness: Correct.

(Tr. IV. 732:12-23). Mr. Naughton made similar comments when discussing specific plaintiff's records. For instance, Mr. Naughton said: "With certain weeks omitted that we did not – were unable to find the records." (Tr. IV. 738:13-14); and "Henryville, we did not have very good records on." (Tr. IV. 741:20). While Mr. Naughton's testimony indicated that there were time periods when two or more full-time employees or their equivalent were supervised by some of the managers, this court cannot say that Mr. Naughton's testimony establishes that these "managers" **regularly and customarily** supervised two or more full-time employees. This is true particularly in light of testimony from former regional manager Dale Roush, who testified that at the lower volume stores there was a great many times in the winter months that the labor schedules were cut so much that there would only be two people to run the store. (Roush Deposition p.42). Furthermore, former regional manager Marvin Mangers

testified by deposition that during the winter-time the "manager" of the stores performed routine clerical duties at least 40 percent of their time "because in the winter-time they was about the only employee there . . . " (Manger Deposition p.14). Mangers further testified that depending on the volume of the store in the winter-time the store was pretty much manned by the man and wife. (Manger Deposition p.18).

In response to this type of testimony that indicated that whether the "managers" regularly and customarily supervised two or more full-time employees depended upon the volume of the stores in question, this court, as mentioned, ordered the parties to supplement the record. Specifically, this court asked the parties to submit to the court the name and location of the stores involved in this action; the names of the plaintiffs employed at each store; whether the store was a large or small store; and a list of any exhibits or pleadings that would assist the court in determining the size of each store in relation to the other stores.[6] The defendants, in their response to the court's

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[6] The court was well aware that a significant percentage of these stores are small "mom and pop" stores in remote places on interstates in the northern part of the United States and that from October 1st to May 1st of each year they are open a limited number of hours a day, that there is very little tourist traffic in many of those months, that the "locals" eat in their town cafes and provide very little business for these "out in the country" stores that close at dusk which is usually 5:30 or 6:00 p.m. The court really believed that the defendants would respond to the courts request for more records with a list or a computer print out showing they had blank number of stores, many in warm weather areas that didn't have short seasons and which routinely had 3 to 10 employees. No such evidence was presented even though it is probably true.

order, stated that they had diligently searched the testimony presented at trial, the testimony of the plaintiffs in depositions and the Exhibits presented by both parties at the time of trial and concluded that there is very little, if any, evidence in the record specifically identifying the volume of the store where any of the plaintiffs were employed. The court already knew this and that was what had prompted the request for more evidence. Defendants admitted that they did not submit direct evidence on the volume of each store. Defendants further stated that the volume of the stores changed during the time period when the plaintiff "managers" were in charge of their stores. Finally, defendants stated that the volume of stores is not determinative as to whether the "managers" were exempt. This ignores the clear directives of the area managers who would not authorize another employee until the business was there. You can't supervise two or more when two or more are not authorized for months at a time. Rather, defendants once again asked this court to consider the labor schedules which they contend establish that the managers always were allotted sufficient labor so as to satisfy the requirements that they supervise two full-time employees or their equivalent. Defendants further asserted that testimony of Stuckey's management established that the managers were given sufficient labor budgets to allow managers to adhere to the labor schedules.

The court notes that the assertion by the defendants that they have established that the managers were given sufficient labor budgets to allow them to adhere to the labor schedules is in direct conflict with the testimony of former regional manager Dale Roush. In his deposition

testimony submitted to the court for consideration the following exchange took place:

> Q. You were looking at some labor schedules that Mr. Nymann handed you. In your opinion, was it possible to run a Stuckey's store within the guidelines of those labor schedules?
>
> A. The higher-volume stores, yes; the lower-volume stores, no.
>
> Q. The Petrimoulx store, could it have been run within the guidelines on those schedules?
>
> A. During the summer months, yes; during the winter months, I would have to say it would be very hard to run within those schedules.
>
> Q. How about the Hoyt store?
>
> A. The Hoyt store would have been approximately the same thing.
>
> Q. And the Renneker store?
>
> A. Renneker's store would have been a little easier, but, yes, in the winter months it would have been tough to follow the schedule.
>
> Q. Why is that?
>
> A. Because in the winter months it was cut down to the point where you would have a great many times it would be two people only.
>
> Q. Did you ever have Mrs. Hoyt complain that she needed more labor hours?
>
> A. Yes.

(Roush Deposition p.42:2-25). Based on this and other evidence, defendants' reliance on the labor schedules and the testimony of George Davis is also misplaced. This

court, in its initial opinion, found that employees were pressurized into falsifying hours. In addition, plaintiffs submitted Exhibit 3 at trial which contained an Exhibit B attached to that exhibit. Exhibit B attached to trial exhibit 3 was prepared as a true and correct copy of the labor budget for the store at Little Sioux, Iowa. That exhibit showed that the labor budget was much different than those in the proposed or sample schedules developed by George Davis. In addition, as previously noted, former regional managers testified that the labor budgets were cut in the winter months so that there would be enough only for two people. Furthermore, in finding of fact 30 in the original order, this court found:

> Defendants' witnesses testified that labor schedule guidelines were "scientifically" developed for Stuckey's and were designed to provide sufficient hours for each store to be adequately staffed based on sales volume. Defendants also contend that regional managers made additional labor money available to a store if he or she requested it and it was justified. However, the testimony with regard to the practicalities of the labor schedule was disputed between the parties.

Based on the foregoing, and after listening to and judging the credibility of the witnesses in this case, this court cannot find that the defendants have met their burden with respect to most managers by proving that the plaintiff "managers" **regularly and customarily** supervised two or more employees. The only manager that this court can specifically say the defendants met their burden of proving the two or more full-time

employee factor is Russell Renecker. On cross-examination Mr. Renecker admitted that customarily and regularly throughout the period from June, 1982 to April, 1985, he had at least two employees on the payroll and sometimes several more, who worked more than 80 hours. (Tr. II, 284:7-13). There were other Russell Reneckers out there but the evidence was not presented to this court.

B. Exercise of Discretionary Power

In its decision reversing and remanding to this court, the Eighth Circuit Court of Appeals stated that the record seems clear that store managers were normally and recurrently called upon to exercise discretionary powers in the day-to-day performance of their duties. *Murray v. Stuckey's Inc.*, 939 F.2d at 620. This court again heard all the arguments of competent counsel for the defendants and reviewed the record diligently and for reasons set out below respectfully draws a different conclusion. The court of appeals then remanded this point to this court for initial consideration. With respect to this issue, 29 CFR § 541.107 states:

> (a) Section 541.1(d) requires that an exempt executive employee customarily and regularly exercise discretionary powers. A person whose work is so completely routinized that he has no discretion does not qualify for exemption.
>
> (b) The phrase "customarily and regularly" signifies a frequency which must be greater than occasional but which, of course, may be less than constant. The requirement will be met by the employee who normally and recurrently is

> called upon to exercise and does exercise discretionary powers in the day-to-day performance of his duties. The requirement is not met by the occasional exercise of discretionary powers.

The explanation in part (a) above that "a person whose work is so completely routinized that he has no discretion does not qualify for exemption" is important in this courts consideration of whether the "managers" **regularly and customarily** exercised discretionary authority. The defendants contend that because the Eighth Circuit Court of Appeals determined, contrary to this court's ruling, that the manager's primary duty was management and that the managers were in "sole charge" of their store, that finding is conclusive in establishing that managers possessed and exercised discretionary authority. The court disagrees. The regulations setting forth the executive exemption specifically list the customary and regular exercise of discretionary powers as a separate and distinct factor in determining whether the exemption applies. The regulation would not set forth that factor as an independent factor if a finding of "management as primary duty" would satisfy that factor. In addition, the following statements were made by the Eighth Circuit in its opinion in this case:

> Like other courts that have considered the question, we believe that the manager of a local store in a modern multi-store organization has management as his or her primary duty *even though the discretion usually associated with management may be limited by the company's desire for standardization and uniformity.*

Murray v. Stuckey's, 939 F.2d at 619 (emphasis added). The court went on to state:

> In this case, it is undisputed that the plaintiff store managers were the on-site employees ultimately responsible for the stores' operations, *even though their discretion was circumscribed.*

Id. at 620 (emphasis added). Finally, the court noted:

> It is clear that Stuckey's store managers satisfy these sole charge standards. The store managers were ultimately in charge of all operations on the premises. *The extent of their control may have been circumscribed by Stuckey's standardized methods of operation and by the supervision of the regional managers,* but this typical organizational characteristic of a modern retail chain does not change the fact that the store managers were, in a very real economic sense, in "sole charge" of the local store operations.

Id. (emphasis added). This court finds, on the basis of the regulation and its interpretation, that the work of the "managers" in this case was "so completely routinized that [they] had no discretion." 29 CFR § 541.107(a). Indeed, as just pointed out, the Eighth Circuit recognized that the "managers" discretion was "circumscribed" and "limited." No where is it more evident that the "managers" had no real discretion than in the testimony of Russell Renecker. On cross examination of Mr. Renecker, defendants attorney tried to elicit what types of discretionary functions Mr. Renecker performed as a "manager." In his responses to questions posed by defendants counsel, Mr. Renecker testified that he was given a training manual that told how to wait on cars and other things (Tr. II, 246:19-22); he was given a labor budget within which to operate (Tr. II, 248:1-8); it was up to the regional manager to determine if someone got a raise or not; (Tr.

II, 248:9-15); he could recommend sick leave but did not have authority of final approval of sick leave (Tr. II, 2509-20); he did not have the authority to fire someone without the regional manager's approval (Tr. II, 251:12-20); the inventory was a set inventory and he would re-order based on how much of that had been sold (Tr. II, 254:19-24); the original inventory could only be changed by the regional manager if he decided you needed more or less of something (Tr. II, 256:2-8); he never purchased anything he wasn't told he could purchase (Tr. II, 256:11-12); the regional manager made the decision whether to stock other products (Tr. II, 257:9-24); if he wanted to buy something at the store he had to have it approved (Tr. II, 258:11-15); his authority to adjust customer complaints was dictated by the company policy that the customer is always right (Tr. II, 262:3-22); if repairs cost over $25.00 he had to get authorization to fix them (Tr. II, 264:9-24); the regional manager decided who made repairs costing over $25.00 (Tr. II, 265:14-16).

Based on testimony of this nature, this court finds that defendants have not met their burden of proving that the "managers" **regularly and customarily** exercised discretionary powers. What little discretion the managers did exercise on a day-to-day basis was so circumscribed as to be no discretion at all. The court does not believe that the powers exercised by these "managers" are clearly and unmistakably within the terms and spirit of the exemption.

Because this court finds that the "managers," with the exception of Russell Renecker, did not regularly and customarily supervise two or more full-time employees

or their equivalent and that none of the managers regularly and customarily exercised discretionary powers, the defendants are not entitled to the executive exemption. Again, this court refers to page 4 of this opinion discussing the "short test" and the "long test" factors. For some plaintiffs it was necessary to address both factors while for others it was only necessary for this court to address the "two or more employees" factor.[7] The Court of Appeals declined to rule on the willful violations and liquidated damages aspect of this case as it pertained to the store managers because of their decision to remand on the above issues. The court did point out that the willfulness and good faith issues must be considered in the context of reasonable reliance on the executive exemption defense. After lengthy and careful consideration as directed by the Court of Appeals, this court adheres to its initial determination that the three year statute of limitations is applicable because Stuckey's violations were willful. The court also adheres to the finding that plaintiffs are entitled to liquidated damages because Stuckey's failed to prove that the violations were both in good faith and predicated upon such reasonable grounds

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[7] The evidence was not clear as to whether Russell Renecker fit within the "short test" or the "long test." If his situation was analyzed under the "short test," it is possible that defendants have proven the executive exemption in his case because of this courts finding that he did regularly and customarily supervise two or more full-time employees. The court will leave it to the parties to reach an agreement as to whether Mr. Renecker fits within the short or long test. Its up or down depending on whether he made more than $250.00 per week or less than that.

that it would be unfair to impose more than a compensatory verdict.

Finally, the Court of Appeals declined to rule on plaintiffs' cross appeal claim that this court erred in calculating the store managers' damages based on a 60 hour work week, rather than a 40 hour work week, and that their attorneys' fee award was inadequate. After further review of the regulations governing the question of calculating hourly rates of pay, specifically 29 C.F.R. § 778.113(a)&(b), the court finds that the correct method of calculating the store managers hourly rate should be determined by dividing the weekly rate by forty (40) rather than sixty (60). The court is persuaded by plaintiffs' assertion that the number of hours the salary was intended to compensate for was forty (40). In addition, plaintiffs pointed out that dividing the weekly rate by sixty (60) would, in at least 7 cases, result in an hourly rate less than the statutory minimum wage. Such a result is contrary to the act. *Oliver v. Mercy Medical Center, Inc.*, 695 F.2d 379 (9th Cir. 1982). The remainder of this court's opinion on the issue of hourly rate of pay for "managers" shall remain the same.[8] In addition, because the Court of Appeals vacated the award of attorney's fees, this court

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[8] Dividing the weekly rate by forty (40) to arrive at an hourly rate of pay (and in no event shall the hourly rate be less than minimum wage) and then multiplying the hourly rate of pay by one and one-half to arrive at the overtime rate. The bonuses paid to "managers" must be totaled with other earnings to determine the regular rate on which overtime pay must be based. Fringe benefits such as paid vacations and holidays shall be excluded in calculating damages herein.

will, at the appropriate time, hold a hearing on the issue of attorney's fees and expenses.

III. CONCLUSION

This court concludes that with the exception of Russell Renecker, the defendants have not met their burden of proof on the issue of whether plaintiff's regularly and customarily supervised two or more full-time employees or their equivalent. The defendants have also failed to meet their burden of proof regarding whether plaintiff's regularly and customarily exercised discretionary powers. The defendants are not entitled to the executive exemption for the store "managers." This court adheres to its previous position regarding the applicable statute of limitations and the finding that plaintiffs are entitled to liquidated damages. The court determines that the appropriate method for calculating plaintiff "managers" hourly rate of pay is by dividing the weekly rate by forty (40) hours rather than sixty (60) hours. Finally, the court will hold further hearings at the appropriate time on the issue of attorney's fees.

Upon the foregoing,

IT IS ORDERED

(1) Defendants are not entitled to the executive exemption for plaintiff store "managers."

(2) The court adheres to its initial determination with respect to the three year statute of limitations and liquidated damages.

(3) The correct method for calculating the "managers" hourly rate of pay is by dividing the weekly rate

by forty (40) rather than sixty (60). The remainder of this courts original findings with regard to that issue shall stay the same.

(4) The court will hold a hearing on the issue of attorney's fees and costs at an early date.

(5) Counsel for both parties shall submit to the court, within twenty (20) days of the date of this order, their calculations as to the amount of monetary judgment each plaintiff "manager" is entitled to based on this courts order. If differences exist with regard to the amounts submitted, the court may hold a hearing to resolve the conflict.

Dated this 16th day of April, 1993.

/s/ Donald E. O'Brien
Donald E. O'Brien, Judge
UNITED STATES DISTRICT COURT

Copy mailed by regular mail April 16, 1993 to:

PL Nymann; Steven Kohl; PO Box 1825; Sioux City, IA 51102

Gene LaSuer; Jean McNeil; 2300 Financial Center; Des Moines, IA 50309

John Renick; 2730 North Ballas Road; Suite 200; St. Louis, MO 63131

/s/ J. Hoch
Deputy Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

SIDNEY MURRAY and GLADYS MURRAY, on behalf of themselves and all others similarly situated, Plaintiffs, vs. STUCKEY'S, INC. and PET INCORPORATED, Defendants.	)	No. C 85-4085 ORDER (Filed Apr. 15, 1994)

This matter comes before the court on plaintiffs' motion for entry of judgment and plaintiffs' renewed and amended motion for attorney fees and expenses. The court has entered several orders which detail the facts in this case at length and therefore, the facts will not be repeated here except as applicable to the motions before the court.

A. MOTION FOR ENTRY OF JUDGMENT:

This court entered an order in April, 1993, reaffirming its original decision that the defendants in this case were not entitled to the "executive exemption" for the store "managers" under 29 U.S.C. § 213(a)(1). In that April, 1993 order the court ordered the parties to submit

to the court their calculations as to the amounts of monetary judgment each plaintiff "manager" would be entitled to based on the court's rulings. Plaintiffs move for entry of judgment in the amounts listed in their calculations plus post judgment interest. Plaintiff asserts that under 28 U.S.C. § 1961, the post judgment interest rate would be 7.9%. Further, plaintiff contends that post-judgment interest should be calculated from the entry of the first judgment in July 16, 1990, before this case was appealed to the Eighth Circuit and sent back on remand. Plaintiffs assert that the court has essentially reaffirmed its prior judgment in favor of the plaintiff "managers." The damages have been increased somewhat because this court made a correction on how damages would be calculated. However, plaintiffs assert that the equities of the situation dictate that the successful "managers" should receive interest on the loss of the use of their money judgments from the date damages were originally determined. *See Buck v. Burton*, 768 F.2d 285 (8th Cir. 1985).

In their resistance to the motion to enter judgment, defendants noted that while they didn't dispute plaintiffs' calculations, they did dispute the court's ruling changing the way damages were calculated. Also in their resistance defendants state that they dispute the dates of employment of certain employees. Ultimately, defendants agree that the plaintiffs' calculations are correct based on the court's rulings. However, they assert that the best interests of justice require the court to rule on the issue of attorney's fees before entering judgment so that there would be one judgment for the defendants [to] consider when deciding whether to pay and settle the claims or to file a Notice of Appeal.

The court has considered the resistance to entry of judgment and concludes that entry of judgment is appropriate at this time. The court so concludes based on the fact that included in this order is a ruling on the motion for attorney's fees. Defendants' resistance to the entry of judgment was based, in large part, on the fact that the court still had not decided the issue of attorney's fees and defendants felt it would be best to have only one judgment from which to appeal. Because the court is ruling on all remaining issues, it is appropriate to order that judgment be entered now. Also, while the court is aware that defendants dispute some of the court's rulings from the April, 1993 order, it is clear that the defendants feel that the calculations of the plaintiffs are correct, based on the court's ruling. The court, in ordering that judgment be entered in the amount as calculated by the plaintiffs, is not indicating that it feels defendants have waived their objections to the rulings that have a bearing on those calculations. In fact, it is clear that defendants have not waived those objections and may in fact pursue them on appeal. With those comments in mind, the court will order that the Clerk of Court enter judgment in favor of the following plaintiffs in the following amounts:

NAME	AMOUNT
Harley Blair	$ 62,276.66
Larry Brown	30,410.50
Kinney Bryant	54,032.83
Randy Bushnell	23,703.49
Floyd Caskey	15,668.35
Allan Christiansen	20,863.72
Bobbie Cockrell	18,201.22
Mary T. Cope	65,143.07
Sandra Crist	46,855.87

Stanley Dixon	75,394.48
Thomas Foster	12,708.86
Edward Geisenheimer	18,095.00
Rae Jean Hamilton	15,187.05
Deborah L. Hoyt	49,498.60
Loren Jacoby	49,816.90
Warren Kajander	21,058.83
Carol Lewis	38,722.75
Thomas Miller	18,311.33
Gladys Murray	74,887.45
Jeanette (Petrimoulx) Arbuckle	88,614.05
Donald Phillips	52,327.83
Joy M. Powers	85,062.51
Russell Renecker	6,127.20
Eugene Rutledge	115,381.79
Donald Scott	31,252.32
Arthur Stotts	31,995.03
Lawrence Taylor	57,767.10
David Thompkins	56,933.61

In addition to the above amounts, the court is persuaded that plaintiffs are entitled to post judgment interest from the date of the original judgment, July 16, 1990, subject to the interest rate determined at that time pursuant to 28 U.S.C. § 1961. Plaintiffs have calculated that interest rate to be 7.9%.

B. MOTION FOR ATTORNEY FEES AND EXPENSES:

In their motion for attorney's fees, plaintiffs state that their counsel, P.L. Nymann and Steven Kohl have devoted a total of 2276.5 hours to this litigation. They also claim out of pocket expenses of $7,014.57 through August 31, 1993 which results in a total of advanced expenses in

the amount of $23,267.78. Plaintiffs point out that in two employment law class action lawsuits previously litigated before this court, *Jansen v. Greyhound* and *Berry v. Greyhound* plaintiffs counsel, Nymann and Kohl, received the following amounts of attorney's fees: In *Jansen*, they claim that for 1,602.9 hours they received $899,898.41, for a fee per hour of $561.42. In *Berry*, they claim that for 686.6 hours they received $442,500.00 for a fee per hour of $644.48. Plaintiffs also note that they are involved in the *Jensen v. SIPCO* matter, but that fees have not yet been ruled on.[1] Plaintiffs contend that based on these two prior cases, a reasonable hourly rate of $650.00 per hour would be considered the normal hourly rate of attorneys in Sioux City and similar markets for similar contingent case litigation of employment law class actions. Plaintiffs further assert that this is reasonable in light of the protracted nature of this litigation (over 8 years) and the tendency of the defense to litigate even the smallest of issues.

Plaintiffs note the 12 factors that are taken into account in determining attorney's fees from *Johnson v. Georgia Highway Express*, 488 F.2d 714, 717-19 (5th Cir. 1974). As mentioned, plaintiffs contend that they have established the prevailing market rate for contingent fee employment class actions in Sioux City by virtue of their settlement awards in the other cases mentioned. Plaintiffs assert that attorneys who take cases on a contingent fee basis must charge a higher fee than those who work on a

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[1] *Jensen v. SIPCO* is a case in front of this court where the identical issue of attorneys' fees is pending. Two of plaintiffs' attorneys in that case are P.L. Nymann and Steve Kohl, the attorneys for the plaintiffs in this case.

noncontingent basis to compensate for the risk of loss, etc.

Plaintiffs cite *Norwood v. Charlotte Memorial Hospital & Medical Center*, 720 F.Supp. 543, 548 (W.D.N.C. 1989); *Sugarland Industries, Inc. v. Thomas*, 420 A.2d 142, 153 (Del. 1980); and *Kirchoff v. Flynn*, 786 F.2d 320 (7th Cir. 1986) for the proposition that the fees they are requesting are reasonable.

In resistance to the motion for attorney's fees, defendants first set forth the procedural history of this attorney fees issue. On August 4, 1989, plaintiffs filed their first application for fees. They sought to recover for 1,444.7 hours of time and expenses of $11,699.56. On December 7, 1989, the plaintiffs amended to seek an[ ] additional 24.3 hours. On Jan. 8, 1990, this court ruled that a reasonable hourly rate for Mr. Kohl to be $70 per hour and $80 per hour for Nymann. The court reduced the number of hours claimed due to unnecessary trips to the courthouse and for claims unrelated to the Fair Labor Standard Act. The court adjusted the fee upward by 15% for the contingency risk of not prevailing. The net award was $126,055.00 and expenses of $16,253.21. A motion to amend was filed by defendants and after further hearing, the court reduced the award by $19,737.50 as plaintiff's counsel had already recovered that amount to settle a portion of the claims. The court also reduced the expenses by $2,694.75. The recovery was $106,317.50 and expenses of $13,558.46. Both parties appealed the award to the 8th Circuit but the Circuit refused to rule because it was remanding the damages award to the court. Because of that ruling, those fees and expenses were not paid.

Plaintiffs now seek to recover for an additional 759.6 hours of time and additional expenses of $11,568.22.

Defendants agree that the appropriate way to determine the reasonable fee is by utilizing the lodestar method whereby you multiply the reasonable hours by a reasonable hourly rate. Any adjustments upward from that figure must be proven by the fee applicant. Defendants point out that the reasonable hourly rate is generally the prevailing market rate in the relevant community. Defendants contend that $650.00 is not a reasonable hourly rate. The[y] assert that there is absolutely no basis for the court to find that this is the prevailing rate in Sioux City or in Iowa. Defendants point out that in a hearing on September 25, 1989 the plaintiffs sought fees of $450.00 per hour. Defendants assert that the court specifically told plaintiffs counsel that the amount he was able to negotiate for his fees in another case was far more than what the court would have awarded.

Defendants state that plaintiffs misrepresent the holding in *Norwood* and further state that the Supreme Court has made it clear that it does not condone outrageous fee awards which are nothing more than a windfall to the attorney. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986).

Defendants point out that the law does not allow an enhanced fee due to contingent risk. That premise was rejected in *Burlington v. Dague*, ___ U.S.___, 112 S.Ct. 2638 (1992). Defendants also point out that the 8th Circuit has consistently reversed attorney fee enhancement for risk of loss since *Dague*. *See, Hukkanen v. International Union of Operating Engineers*, 3 F.3d 281, 287 (8th Cir. 1993); *Jeffers*

v. Clinton, 992 F.2d 826, 830 (8th Cir. 1993); *Kientzy v. McDonnell Douglas Corp.*, 990 F.2d 1051, 1063 (8th Cir. 1993). Plaintiffs respond to this argument by asserting that they are not asking for an enhancement based on contingent risk and therefore, the *Dague* case is not applicable. Defendants go on to assert that the appropriate hourly rate would be that rate that these attorneys normally charge and which was found to be the rate by the court earlier, $70 per hour for Kohl and $80 per hour for Nymann. Further, defendants assert that this hourly rate should be decreased for those substantial hours the plaintiffs' counsel is claiming for time spent on the attorney's fee issue.

Next defendants assert that plaintiffs are asking for $4,553.65 for expert witness fees and these fees are not recoverable under fee shifting statutes unless the statute specifically provides. *Crawford Fittings Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987); *West Virginia University Hospitals, Inc. v. Casey*, ___ U.S.___, 111 S.Ct. 1138 (1991). Defendants point out that there is no explicit language allowing the shifting of expert witness fees under 29 U.S.C.A. § 216(b). *See, Gray v. Phillips Petroleum Co.*, 971 F.2d 591 (10th Cir. 1992). Defendants assert that expert witness fees of $40 per day is all that is allowed under 28 U.S.C. § 1821(b).

Finally, defendants contend that plaintiffs are not entitled to recover for time spent on a premature appeal in January 1990. Further, they should not be compensated for any of the time spent seeking Rehearing and Rehearing En Banc before the court of appeals. Defendants point out that plaintiffs were unsuccessful in both instances. Defendants also object to plaintiffs collecting for their

time spent seeking certiorari before the U.S. Supreme Court or the $400 it cost for plaintiffs' attorneys to become admitted to the U.S. Supreme Court, or the $2,367.25 of printing costs for their Supreme Court brief.

The Court first notes that the proper method for setting a reasonable attorney's fee begins with a determination of the lodestar amount. The lodestar is obtained by multiplying " 'the number of hours reasonably expended on the litigation times a reasonable hourly rate.' " *Pennsylvania v. Delaware Valley Citizens' Council for Clear Air*, 478 U.S. 546, 565 (1986); see also *Hensley v. Eckerhart*, 461 U.S. 424, 433-34 (1983); *Accord M.C. Jeffers v. Clinton*, 992 F.2d 826 (8th Cir. 1993). Because defendants do not challenge plaintiffs' counsel's right to attorneys' fees or the number of hours expended by plaintiffs' counsel, the only question before the Court is what constitutes a reasonable hourly rate for counsels' work in this case. In addition, the court will have to rule on certain "classes" of fees requested such as the fees on appeal and the expenses incurred to apply to the Supreme Court. Initially, to arrive at a reasonable hourly rate, a court must look to the "prevailing market rates" in the relevant community. *Blum v. Stenson*, 465 U.S. 886, 896 (1984). "Where an attorney requesting fees has well-defined billing rates, those rates can be use to help calculate a reasonable rate for a fee award." *McDonald v. Armontrout*, 860 F.2d 1456, 1459 (8th Cir. 1988). The use of well-defined billing rates to set a reasonable rate is consistent with *Blum*, because " 'in most cases, billing rates reflect market rates – they provide an efficient and fair short cut for determining the market rate.' " *Id.* at 1459; (citing *Student Pub. Interest Research Group, Inc. v. AT and T Bell*

Laboratories, 842 F.2 1436, 1445 (3d Cir. 1988)). An attorney's ordinary billing rate is not conclusive of reasonableness, however, and it should be compared to the usual and customary fee for similar work in the community. *McDonald*, 860 F.2d at 1459.

Although plaintiffs' assert that the *Jansen* and *Berry* cases must determine the prevailing market rate in the Sioux City area, this Court is persuaded that translating fees agreed to in settlement negotiations into ordinary hourly fee rates would lead to an unreasonable attorneys' fee award. If the Court uses the *Jansen* and *Berry* cases to set the prevailing hourly market rate in this case, plaintiffs' counsel would be awarded $650.00 per hour in attorneys' fees multiplied by over 2000 hours for a total of over $1,300,000.00. This Court is not persuaded that it is bound by the fee agreements in the *Jansen* and *Berry* settlements. A decision by the parties to settle a case depends on a wide variety of factors that ultimately influence the amount of the settlement and the agreement as to attorneys' fees. Each case has different facts and circumstances, and thus the amount of settlement awards and attorneys fees vary greatly. Most importantly, this Court has found no authority to support the proposition that attorneys' fees agreed to in a settlement can be used to set "the prevailing market rate" for a case that went to trial. This Court finds that a more appropriate guide in determining the hourly rate in this case is to look to counsel's ordinary hourly rate, and therefore, the Court sets the lodestar fee in this case at $110 for Steven Kohl, and at $115 for P.L. Nymann.[2]

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[2] The Court is not persuaded that it is bound by the $70-$80 hourly fee award made several years ago in this case as

After determining an initial lodestar fee, courts are also advised to consider the factors identified in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), in setting a reasonable attorneys' fee award. This Court, according to *Johnson*, must consider, among other things, the time and labor spent on the case, the novelty and difficulty of the legal issues involved, the skill required to perform the legal service, the experience and ability of the attorneys, and the results obtained for the client. *Id.* at 717-19; *see also McDonald v. Armontrout*, 860 F.2d 1456, 1459 (1988). In this case, plaintiffs' counsel very competently represented a class of plaintiffs in a complex piece of litigation. Plaintiffs' counsel devoted a significant amount of time and effort to the case and were successful in obtaining awards for plaintiffs both initially and on remand to this court. Furthermore, each of plaintiffs' counsel have several years of experience in the labor and employment law fields and also have specific experience in class action litigation. For these reasons, this Court finds it appropriate to enhance the hourly fee rate in this case to $250.00 an hour.[3]

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defendant argues. Nymann and Kohl have since reported to the court in the *Jensen* case that their hourly rates are $115.00 and $110.00 per hour respectively.

[3] The Court realizes that to enhance each attorneys' fee proportionally, the court would have to award P.L. Nymann $255.00 per hour because Nymann's hourly fee is $115.00, as compared to $110.00 an hour for Steven Kohl. To award P.L. Nymann the $255.00 rate, however, this court would need to know the total number of hours that Nymann spent on this case. In their briefs and exhibits to the court, Nymann and Kohl failed to state the total number of hours that *each* attorney spent on the case. The totals provided were the total number of hours spent

As previously mentioned, the defendants did not challenge the number of hours expended by plaintiffs on this case. In fact, the court would note that the most recent filing by the plaintiffs following discovery indicates that plaintiffs are seeking compensation for 2,276.5 hours of work while defendants appear to have devoted more than 2,624.4 hours on their case. The court does note that defendants have challenged certain "classes" of fees and expenses being claimed by plaintiffs. Specifically, as mentioned, defendants assert that plaintiffs are not entitled to the $4,553.65 in expert fees they are requesting. The court has reviewed the cases cited by the defendants and agrees that there is no explicit language allowing the shifting of expert witness fees under 29 U.S.C. § 216(b). The court is persuaded that expert witness fees are not recoverable as part of reasonable attorney's fee and costs of the action in this case. *Gray v. Phillips Petroleum Co.*, 971 F.2d 591 (10th Cir. 1992). Therefore, that amount will be subtracted from the $23,267.78 in expenses requested.

Defendants also contend that plaintiffs hourly fee should be reduced for the hours that plaintiffs' counsel spent working on the issue of attorney's fees. They cite *Delfin v. Turnage*, 792 F.Supp. 522, 525 (W.D. Ky. 1992) and *Gabriele v. Southworth*, 712 F.2d 1505, 1507 (1st Cir. 1992)

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by both attorneys. In addition, Nymann and Kohl, in their request for attorneys' fees of $650.00 per hour did not indicate that they felt Mr. Nymann should be paid at $5.00 per hour more because of his ordinary hourly fee. The court is persuaded that $250.00 is an appropriate fee per hour for both attorneys in a case of this nature, despite the fact that Nymann ordinarily charges $5.00 per hour more than Kohl.

for that proposition. Again, the court has reviewed those cases and determines that a reduction in rate is appropriate in this case. While an enhancement of the hourly rate is appropriate due to the complex nature of this litigation and the other factors discussed previously, the court is not persuaded that those same factors apply to the issue of attorney fees. Still, the court is persuaded that the issue of attorneys' fees directly affects the plaintiffs in this case and a small upward adjustment from the lodestar amount is warranted for those hours spent on the issue of attorneys' fees. The court is persuaded that plaintiffs' counsel should be paid at least half of the other hourly rate or $125.00 per hour for the hours spent on the issue of attorneys' fees. Therefore, for the time that plaintiffs' counsel spent on the issue of attorney fees, the fees awarded will be $125.00 per hour.

In addition, the court is not persuaded that it should not award fees or reduce fees for time spent pursuing an appeal and rehearing in front of the 8th Circuit. The court is persuaded that plaintiffs should be compensated at the rate of $250.00 per hour for that activity. The court cannot say the appeals were frivolous or baseless. However, the court does feel it would be inappropriate to allow $400.00 in expenses for plaintiffs' attorneys to become admitted to practice before the United States Supreme Court and for the printing costs of $2,367.25 in their unsuccessful attempt at certiorari before that Court, as well as the hours spent on that appeal. Due to the degree of success obtained, the court is persuaded that those amounts should be subtracted from the expenses and hours prayed for. The court has calculated the hours spent before the

Supreme Court to be 116.6. Those hours shall be subtracted from the total number of hours claimed.

Based on these rulings by the court, the court calculates the attorney fees to be as follows: Plaintiffs were seeking fees for a total of 2,276.5 hours of work. Based on a previous order by the court in October, 1990, 12.3 of those hours were being claimed for trips to the courthouse which the court ruled were not compensable. This leaves 2,264.2 hours claimed. The court has ruled that the hours spent on petition for certiorari to the U.S. Supreme Court should not be reimbursed. The court calculated from plaintiffs' time sheets that 116.6 hours were spent on the appeal to the Supreme Court. Subtracting 116.6 from 2,264.2 leaves 2,147.6 hours claimed. In addition, the court has determined that the hours spent on the issue of attorney fees should be compensated at a lower rate per hour than other work on the case. The plaintiffs' presented to the court an itemization indicating that 90.1 of the original 2,276.5 hours claimed were hours spent on the issue of attorney fees. Subtracting those hours from 2,147.6 leaves 2057.5 hours to be compensated at $250.00 per hour. A total of 2057.5 hours at $250.00 per hour amounts to an award of $514,375.00. As for the 90.1 hours spent on the attorney fees issue, multiplied by $125.00 per hour gives a total for those hours of $11,262.50. Combined, this results in a total attorney fee award of $525,637.50. Finally, the defendants pointed out that plaintiffs have already recovered $19,737.50 in attorney fees and that amount must be subtracted from the award given here. Based on the order of this court of July 16,

1990, the court agrees that this amount must be subtracted from the fee award here to prevent duplicate recovery. That leaves an award of $505,900.00.

With regard to the expenses claimed by plaintiffs in this case the court calculates as follows: Plaintiffs request a total of $23,267.78 in expenses. The court has ruled that the expenses of expert witness fees are not recoverable and therefore, $4,553.65 must be subtracted from that amount, leaving $18,714.13 claimed. In addition, the court has ruled that the $400.00 claimed for admission to the Supreme Court practice is not recoverable, leaving $18,314.13. Further, the court has denied the requested $2,367.25 for printing costs for the petition for certiorari to the U.S. Supreme Court. This leaves $15,946.88. Finally, in this court's July 16, 1990 order, the court reduced the original expenses requested by $2,694.75 for travel, motel and meal expenses being claimed by plaintiffs attorneys. The court still deems it appropriate to exclude those expenses. This leaves a total of $13,252.13 in expenses that plaintiffs should receive.

Upon the foregoing,

IT IS ORDERED:

(1) The Clerk of Court is directed to enter judgment in favor of the following plaintiffs in the following amounts, plus post judgment interest from July 16, 1990 pursuant to 28 U.S.C. § 1961:

NAME	AMOUNT
Harley Blair	$ 62,276.66
Larry Brown	30,410.50
Kinney Bryant	54,032.83
Randy Bushnell	23,703.49

Floyd Caskey	15,668.35
Allan Christiansen	20,863.72
Bobbie Cockrell	18,201.22
Mary T. Cope	65,143.07
Sandra Crist	46,855.87
Stanley Dixon	75,394.48
Thomas Foster	12,708.86
Edward Geisenheimer	18,095.00
Rae Jean Hamilton	15,187.05
Deborah L. Hoyt	49,498.60
Loren Jacoby	49,816.90
Warren Kajander	21,058.83
Carol Lewis	38,722.75
Thomas Miller	18,311.33
Gladys Murray	74,887.45
Jeanette (Petrimoulx) Arbuckle	88,614.05
Donald Phillips	52,327.83
Joy M. Powers	85,062.51
Russell Renecker	6,127.20
Eugene Rutledge	115,381.79
Donald Scott	31,252.32
Arthur Stotts	31,995.03
Lawrence Taylor	57,767.10
David Thompkins	56,933.61

(2) That judgment be entered in favor of P.L. Nymann and Steve Kohl together for $505,900.00 in attorneys' fees consistent with this opinion.

(3) That judgment be entered in favor of P.L. Nymann and Steve Kohl together for $13,252.13 in costs

and expenses of the litigation, consistent with this opinion.

Dated this 15th day of April, 1994.

/s/ Donald E. O'Brien
Donald E. O'Brien, Senior Judge
UNITED STATES DISTRICT COURT

Copy mailed by regular mail April 15, 1994 w/Judgment to:

PL Nymann; Steven Kohl; PO Box 1825; Sioux City, IA 51102

Gene LaSuer; Jean McNeil; 2500 Financial Center; 666 Walnut Street; Des Moines, IA 50309-3993

John Renick; 2730 North Ballas Road; Suite 200; St. Louis, MO 63131

/s/ J. Hoch
Deputy Clerk

APPENDIX E

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

Nos. 90-2375, 90-2376 and 90-2897NI

Gladys Murray, on Behalf of Herself and All Others Similarly Situated, consent to become party plaintiffs: Floyd Caskey; Christine Christiansen; Allan Christiansen; Donald Scott; Roger D. Hoyt; Deborah L. Hoyt; Russell C. Renecker; Carol Renecker; Eugene A. Rutledge; Lawrence B. Taylor; Warren Kajander; Jeannette Petrimoulx; Kinney Bryant; Bettye Bryant; Carol S. Lewis; James L. Lewis; Harley Blair; Thomas Miller; Joyce Thompkins; Veralyn Blair; Sandra L. Crist, in her capacity as executrix of the estate of Kenneth L. Crist; Kenneth Crist; Rita Miller; Michael Hamilton; Anna M. Foster; Joni Bushnell; Lois Louise Phillips; Adrienne Geisenheimer; Sharon Jacoby; Bonnie Stotts; Linda M. Brown; Sandra Crist; Larry Brown; Randy Bushnell; Bobbie Cockrell; Mary T. Cope; Stanley Dixon; Thomas Foster; Edward Geisenheimer; Rae Jean Hamilton; Loren Jacoby;	*	Appeal and Cross-Appeal from the United States District Court for the Northern District of Iowa.

Donald Phillips; Joy M. Powers; Arthur Stotts; David Tompkins; Sidney Murray; Bev Caskey; Michelle Scott; Kevin Murray; Joylene Taylor; William Pohlman; Robert Pohlman; Nancy Pohlman; Robin Kajander; Tony Tompkins; Tracy Tompkins; Georgina Phillips; Tammy Moore; Bonita Dixon; Charles Brown,

Plaintiffs-Appellees
and Cross-Appellants.

v.

Stuckey's, Inc. and Pet Incorporated,

Defendants-Appellants
and Cross-Appellees.

Submitted: February 13, 1991

Filed: July 25, 1991

Before BOWMAN, MAGILL, and LOKEN, Circuit Judges.

LOKEN, Circuit Judge.

Stuckey's, Inc. and its parent, Pet, Incorporated ("Stuckey's"), appeal from the district court's judgment after a bench trial awarding more than $900,000 in compensatory and liquidated damages and $142,000 in attorneys' fees to forty-five of its former store managers and

hourly employees for violations of the maximum hours (overtime) requirements of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 207. Stuckey's argues that the district court erred in rejecting Stuckey's defense that the store managers were exempt executive employees, in concluding that Stuckey's violations were willful for statute of limitations purposes, in awarding liquidated damages, in failing to require adequate proof of compensatory damages by each plaintiff, and in its award of attorneys' fees. Plaintiffs have cross-appealed challenging the district court's calculation of the store managers' compensatory damages and the attorneys' fee award. For the reasons discussed below, we affirm the damage awards to the hourly employees, reverse the district court's resolution of the executive exemption issue, and remand to the district court for further proceedings.

I. Facts and Proceedings Below

During 1982-1985, the period at issue in this proceeding, Stuckey's operated roadside stores along interstate and other major highways across the United States. These stores were combination gasoline stations, convenience stores, and restaurants. Pet had acquired Stuckey's, Inc. just prior to 1982 and was attempting to reverse its lack of competitive success in the 1970's. The attempted turnaround failed, and Stuckey's stores were closed sometime after 1985.

Each Stuckey's store had an on-site store manager responsible for its day-to-day operations. Where possible, Stuckey's hired married couples who were required to live on the premises. One spouse was hired as the store

manager and received compensation on a salary basis, with the opportunity for a profit-oriented bonus; the other worked as an hourly employee, typically at or near the minimum wage. Each store manager reported to a regional manager who was responsible for 10 to 20 stores. Regional managers visited their various stores periodically and communicated with the store managers by telephone on at least a weekly basis.

In addition to managing the store's day-to-day operations, each store manager was responsible for hiring sufficient additional workers to staff the store in accordance with a labor budget furnished by Stuckey's. Stuckey's based these labor budgets on the projected volume of business in each store, which varied seasonally as well as from store to store. In these budgets, the manager was scheduled to work 60 hours per week, and his or her spouse was scheduled to work 40, or in some cases 44 hours per week.

Plaintiffs Sidney and Gladys Murray filed this action alleging that Stuckey's unlawfully failed to compensate them for the overtime that each of them worked at Stuckey's stores in Randall and Little Sioux, Iowa. Pursuant to 29 U.S.C. § 216(b), the other, similarly situated plaintiffs filed written consents and became additional parties. During the lengthy court trial, numerous plaintiffs' witnesses testified that Stuckey's labor budgets were unrealistic, so that store managers and their spouses in fact worked many additional unpaid hours "off the clock." The store manager plaintiffs testified that they were required to work as many as 120 hours per week, so that they received less than the minimum wage, in order to meet Stuckey's stated requirement that they work "as

long as it took to get the job done." The hourly employee spouses testified that they worked far more than the 40 or 44 hours for which they were scheduled and paid, and that Stuckey's regional managers refused to allow them to work paid overtime and in fact knew that these plaintiffs were working many unpaid hours to help their manager spouses "get the job done."

Stuckey's defended its practices as lawful under the FLSA. Stuckey's presented evidence intended to show that its store managers were executive employees for FLSA purposes and thus were not subject to FLSA's minimum wage and overtime requirements. In addition, numerous Stuckey's witnesses testified that the schedules were reasonable, that hourly employees were properly paid for all recorded hours, and that plaintiffs' claims of additional hours worked were grossly exaggerated. Stuckey's supervisory witnesses denied any knowledge that managers' spouses had in fact worked unpaid overtime.

After trial, the district court initially determined that the plaintiff store managers had worked more than their scheduled 60 hours per week, and that they were not exempt executives and therefore were entitled to FLSA overtime compensation for all hours worked over 40 per week. The court found that the hourly paid plaintiffs had worked substantial unpaid overtime, and that Stuckey's had discouraged these plaintiffs from reporting overtime hours and therefore knew or should have known of the overtime violations. Having concluded that Stuckey's violations were willful, the court held that the three year statute of limitations applied and that Stuckey's was liable to each plaintiff for liquidated damages in an amount

equal to the compensatory damages (the amount of the unpaid overtime).

Following further factual submissions and argument concerning the amount of damages, the district court entered two additional orders, first determining the maximum number of unpaid overtime hours worked by each group of plaintiffs, and then fixing a specific amount of damages for each plaintiff and the attorneys' fees to be awarded in favor of all plaintiffs. This appeal followed.

II. The Store Managers

Stuckey's store managers were paid a flat weekly salary, were scheduled to work a 60-hour week, and were told to work for as long as it took to "get the job done." The district court determined that this compensation arrangement was inconsistent with the FLSA's core requirement that covered employees be paid 1 1/2 times their regular rate for hours worked in excess of 40 per week.[1] Stuckey's principal argument on appeal is that the

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[1] The district court then converted this determination into damage awards in its later post-trial rulings. First, it held: "The hourly rate shall be determined by dividing the weekly rate by sixty (60) for managers . . . . Managers shall receive one half of the hourly wage in overtime pay for each of the 20 hours from 40 to 60 that they worked each week. They shall receive one and one half times the hourly wage for each hour over 60 worked each week. The maximum hours per week to be allowed in figuring overtime for managers is 70 for each week from October 1 to May 1 and 77 for each week from May 1 from [sic] October 1." Specific damages were then awarded to each store manager plaintiff in the third post-trial order of July 14, 1990. Given our resolution of the executive exemption issue, we need not consider Stuckey's challenge to these damage awards.

evidence established that the store managers were "bona fide executive" employees and were therefore exempt from FLSA's overtime requirements under Section 13(a)(1) of the Act, 29 U.S.C. § 213(a)(1).

Section 13(a)(1) expressly provides that the term "bona fide executive" shall be "defined and delimited from time to time by regulations of the Secretary" of Labor. The Secretary's regulations provide a complicated definition of an "executive employee." To establish that an employee is an exempt executive, the employer must show that the employee:

- is one whose "primary duty" consists of the management of a recognized subdivision of the employer's enterprise;
- "regularly directs the work of two or more other employees";
- "has the authority to hire or fire other employees" or makes recommendations as to hiring, firing, and promoting that are "given particular weight";
- "regularly exercises discretionary powers"; and
- devotes less than 40 percent of the work week to nonexempt activities *or* "is in sole charge of . . . a physically separated branch establishment."

29 C.F.R. § 541.1. This regulation is further complicated by a provision that employees who earn more than $250 per week need satisfy only the first two of the above requirements (the so-called "short test"), whereas employees who earn less than $250 per week must satisfy all five (the "long test"). Since some of Stuckey's store

managers fell into each earnings category during portions of the damage period, both the short test and the long test are at issue in this case.

Primary Duty. Much of the evidence at trial addressed Stuckey's contention that the plaintiff store managers' work satisfied the "primary duty" prong of the executive employee definition. Seeking to demean or minimize the importance of the manager's position, the plaintiff managers testified that most of their time was spent on routine non-management jobs such as pumping gas, mowing the grass, waiting on customers and stocking shelves; that the manager's duties could be and were regularly handled by the manager's hourly-paid spouse; and that all decisions of real importance were made by Stuckey's regional managers to whom the store managers regularly reported. On the other hand, Stuckey's witnesses testified that the store managers were in charge of the day-to-day store operations, which encompassed the hiring and firing of other store employees, as well as numerous other discretionary management functions such as training and supervising store employees, ordering merchandise, handling customer complaints, and safe-guarding cash receipts.

The district court resolved this crucial issue in favor of plaintiffs, concluding that Stuckey's had failed to establish that the store managers' primary duty was management for three reasons – because the managers spent 65-90 percent of their time performing non-managerial duties, because "there were little, if any, differences in the duties of managers and their spouse hourly employees," and because "Stuckey's regional managers served as the

'real managers' of their stores." We disagree with this interpretation of the regulations.

The Secretary's regulations specifically define the primary duty concept: 29 C.F.R. § 541.103 provides that the primary duty determination "must be based on all the facts in a particular case" and that the amount of time spent on managerial duties is a relevant, but not dispositive, factor:

> In the ordinary case it may be taken as a good rule of thumb that primary duty means the major part, or over 50 percent, of the employee's time. Thus, an employee who spends over 50 percent of his time in management would have management as his primary duty. Time alone, however, is not the sole test, and in situations where the employee does not spend over 50 percent of his time in managerial duties, he might nevertheless have management as his primary duty if the other pertinent factors support such a conclusion. Some of these pertinent factors are the relative importance of the managerial duties as compared with other types of duties, the frequency with which the employee exercises discretionary powers, his relative freedom from supervision, and the relationship between his salary and the wages paid other employees for the kind of nonexempt work performed by the supervisor.

The district court's finding that the managers spent 65-90 percent of their time on non-managerial duties, though imprecise and unexplained, is relevant and not clearly erroneous. However, it is not a controlling factor under the regulations. As the court said in *Donovan v. Burger King Corp.*, 672 F.2d 221, 227 (1st Cir. 1982), "the person

'in charge' of a store has management as his primary duty, even though he spends the majority of his time on non-exempt work and makes few significant decisions."

The district court's second reason, that the managers and their spouses shared their duties, is in our view irrelevant to the primary duty inquiry. It is undisputed that Stuckey's only designated one employee at each store to be the manager and only seeks an executive exemption for that one designated employee. The question is whether that person, who was in charge of the day-to-day operations of an isolated gasoline station, convenience store and restaurant, had management as his or her primary duty. It is irrelevant to that question whether the manager delegated some discretionary duties, or whether other employees who reported to the manager were capable of performing part or even all of the manager's duties. The employer is still entitled under the FLSA and the regulations to have one designated exempt executive at this type of facility.[2] *See Tipple v. Affordable Inns, Inc.*, 24 Wage & Hour Cas. 975 (BNA) (W.D. Okla. 1980) (spouses were hired as "co-managers" of employer's motels; manager's duties included "complete operation of the office"; held, one spouse an exempt executive, the other entitled to FLSA damages for unpaid

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[2] The Secretary's regulations specifically warn that an employer may not expand the number of exempt supervisors beyond the amount of managerial work required. *See* 29 C.F.R. § 541.105(d). Significantly, the regulations do not provide, conversely, that an employee whose primary duty is managerial will not qualify for exempt executive status because other, non-supervisory employees are able to and sometimes do perform his or her managerial duties.

overtime). Thus, the district court erred in relying upon this factor.

We also conclude that the district court misinterpreted the Secretary's primary duty regulation in relying upon its third reason, that the regional managers were the "real managers" of Stuckey's stores. Section 541.102 of the regulations explains what types of work are exempt managerial duties. The record is clear that the store managers performed, at the local level on a day-to-day basis, the types of management tasks described in § 541.102(b). It is true that Stuckey's manufactured candy and purchased gasoline for its stores on a national basis and, like most modern retail chains, prescribed and standardized many aspects of store operations. It is also true that the regional managers actively supervised the store managers, traveling to each store from time to time and communicating by phone with store managers at least weekly to monitor compliance with Stuckey's standardized methods of operation. However, we do not believe that the local store manager's job is any less managerial for FLSA purposes simply because he or she has an active regional manager boss. Like other courts that have considered the question, we believe that the manager of a local store in a modern multi-store organization has management as his or her primary duty even though the discretion usually associated with management may be limited by the company's desire for standardization and uniformity.

In *Donovan v. Burger King Corp.*, 675 F.2d 516, 521 (2d Cir. 1982), the court concluded that the primary duty of Burger King Assistant Managers was managerial, noting that "the restaurants could not operate successfully

unless the managerial functions of Assistant Managers, such as determining amounts of food to be prepared, running cash checks, scheduling employees, keeping track of inventory, and assigning employees to particular jobs, were performed." Rejecting the Secretary's argument that all these duties were dictated by Burger King's detailed instructions, the court observed:

> We fully recognize that the economic genius of the Burger King enterprise lies in providing uniform products and service economically in many different locations and that adherence by Assistant Managers to a remarkably detailed routine is critical to commercial success. The exercise of discretion, however, even where circumscribed by prior instruction, is as critical to that success as adherence to "the book."

675 F.2d at 521-522. Under the Secretary's regulations as construed in *Burger King*, the primary duty of a local store manager is no less managerial because the store manager reports to a distant regional manager whose primary duty is to manage multiple stores at a higher level within the organization. As the court said in *Donovan v. Waffle House, Inc.*, 26 Wage & Hour Cas. (BNA) 868, 874 (N.D. Ga. 1983), "The mere fact that a superior comes in for a one- or two-day visit does not destroy the inferior's sole charge status if during the intervals when the superior is absent the inferior manager makes the decisions normally made by an executive in charge of an establishment." *See also Marshall v. Sally Beauty Co.*, 25 Wage & Hour Cas. (BNA) 672 (E.D. La. 1982).

Having concluded that the district court erred in construing the primary duty factor, we turn again to

§ 541.103 of the Secretary's regulations, which provides in part:

> [I]n some departments, or subdivisions of an establishment, an employee has broad responsibilities similar to those of the owner or manager of the establishment, but generally spends more than 50 percent of his time in production or sales work. While engaged in such work he supervises other employees, directs the work of warehouse and delivery men, approves advertising, orders merchandise, handles customer complaints, authorizes payment of bills, or performs other management duties as the day-to-day operations require. He will be considered to have management as his primary duty.

In this case, it is undisputed that the plaintiff store managers were the on-site employees ultimately responsible for the stores' operations, even though their discretion was circumscribed. Thus, their responsibilities placed them squarely within the dictates of the above regulation, as construed by *Burger King* and other decisions dealing with comparable multi-store operations. Accordingly, we conclude that the district court erred in ruling that Stuckey's failed to prove that the plaintiff store managers' primary duty was management for purposes of the first part of the "bona fide executive" test, 29 C.F.R. § 541.1(a).

Two or More Employees. To qualify for the executive exemption, Stuckey's also must prove that each store manager regularly supervised two or more employees. The district court did not reach this issue. The evidence included Stuckey's labor budget documents, which

appear to reflect that all Stuckey store managers supervised the equivalent of at least two other full-time employees at all times. Since the district court concluded that these labor budgets understated the labor needed to run the stores, it seems likely that Stuckey's met its burden of proof as to this factor. However, this was a contested issue at trial, and it appears that the district court deferred rulings on the admissibility of other evidence Stuckey's submitted on the question. Under these circumstances, it would be inappropriate for us to resolve this issue in the first instance. Accordingly, it is remanded to the district court for further consideration.

Other "Long Test" Factors. For store managers earning less than $250 per week, Stuckey's must also satisfy three other criteria to establish the § 13(a)(1) executive exemption. Two of these criteria, relating to authority to hire and fire and to the exercise of discretionary powers, were not addressed by the district court. Although the record seems clear that store managers had the authority to hire and fire other employees, and that they were "normally and recurrently . . . called upon to exercise . . . discretionary powers in the day-to-day performance of [their] duties," 29 C.F.R. § 541.107(b), we again will remand to the district court for initial consideration of these issues.

The final criterion requires that Stuckey's prove either that its store managers spent more than 60 percent of their work time on managerial duties, which the district court found they did not, or that each manager was "in sole charge of . . . a physically separated branch establishment," 29 C.F.R. § 541.1(e). The district court

concluded that the sole charge exception was not applicable "based upon the same reasoning as set forth in the court's analysis of the primary duties exception."

As defined in the regulations, the sole charge exception seems to be written for employees like these store managers. The branch being managed "must have a fixed location and must be geographically separated from other company property," 29 C.F.R. § 541.113(b). Only one person may qualify as being in sole charge of the branch establishment, but the exemption is not lost "because of an occasional visit to the branch office of the superior of the person in charge," 29 C.F.R. § 541.113(d). In order to qualify, "the employee must ordinarily be in charge of all the company activities at the location where he is employed," 29 C.F.R. § 541.113(e).

It is clear that Stuckey's store managers satisfy these sole charge standards. The store managers were ultimately in charge of all operations on the premises. The extent of their control may have been circumscribed by Stuckey's standardized methods of operation and by the supervision of the regional managers, but this typical organizational characteristic of a modern retail chain does not change the fact that the store managers were, in a very real economic sense, in "sole charge" of the local store operations. As the court said in *Waffle House, supra,* 26 Wage & Hour Cas. (BNA) at 875, "A person who, by the decisions he alone makes with the resources provided, can have a direct and substantial effect on sales and profits is in the economic sense in sole control of a profit center." Accordingly, the district court erred in determining that the store managers who earned less

than $250 per week were not in sole charge of their stores for FLSA purposes.

III. The Hourly Employees

As to the hourly employee plaintiffs, the district court found that these employees worked substantial unpaid overtime hours with the knowledge of Stuckey's regional managers who "pressured [plaintiffs] into falsifying hours of work as it pertained to overtime." Based upon these findings, the district court concluded that these plaintiffs were not limited to the overtime reflected on Stuckey's falsified records and that Stuckey's had the burden of proof as to the number of hours actually worked under *Anderson v. Mount Clemens Pottery Co.*, 328 U.S. 680 (1946). On appeal, Stuckey's does not contest liability to these plaintiffs but argues that the district court misapplied *Mount Clemens* in awarding damages.

The district court's finding that these plaintiffs were pressured into not recording overtime hours worked is not clearly erroneous. Despite this proof that its overtime records were unreliable, Stuckey's contends that the district court erred in shifting the burden of proof as to hours worked (damages) because plaintiffs' evidence failed to show, *for each individual plaintiff*, "that he has in fact performed work for which he was improperly compensated and . . . the amount and extent of that work as a matter of just and reasonable inference," *Mount Clemens*, 328 U.S. at 687. Stuckey's argues that this is not a case where "pattern or practice" damage evidence is sufficient because each plaintiff's situation was different. In addition, since at least some of plaintiffs' individual estimates

of hours worked were obviously rejected by the district court, that court's failure to provide individualized findings and analysis as to the unpaid overtime hours worked by each plaintiff requires that the damage awards be reversed.

We agree with Stuckey's that *Mount Clemens* requires the plaintiff in a falsified records case to present a prima facie case as to the unpaid overtime hours worked before the burden of proof shifts to the defendant. We also agree that this burden must be met individually by each plaintiff in a case such as this where differing work situations make pattern evidence unpersuasive. Although the district court failed to articulate this portion of the *Mount Clemens* standard in its memoranda, we conclude that Stuckey's has not demonstrated on the record before us that the district court erred in its specific awards to the hourly employee plaintiffs.

In its initial decision following trial, the district court included the following finding:

> 42. The parties have advised the court during trial that, in the event that the court holds in favor of the plaintiffs, they believe they can agree upon a calculation of the amounts due each plaintiff. . . . The court . . . does not have an adequate record before it concerning the precise damages sustained by each plaintiff. Therefore, if the parties cannot reach a mutual agreement as to damages, the court will consider the damages sustained herein in light of legal precedents hereinafter set out, including the possibility of taking additional testimony.

In its second post-trial order, the district court established "the maximum hours per week to be allowed in figuring overtime" for hourly paid plaintiffs. Then, in its third order, which awarded specific dollar amounts to the eighteen plaintiffs in this category, the district court explained that plaintiffs had filed damage calculations for these plaintiffs and that Stuckey's had filed responses in which it agreed with plaintiffs' calculation of the total amounts to be awarded to sixteen plaintiffs but contested plaintiffs' damage calculations for the other two. The district court then specifically addressed Stuckey's arguments before making awards to those two plaintiffs.

On appeal, Stuckey's does not attack the specific damage calculations submitted by plaintiffs, and does not contest the district court's statement that Stuckey's agreed with those damage calculations. Moreover, Stuckey's did not include in the appeal record those portions of the trial record that would reflect how the unpaid overtime hours worked were calculated.[3] we find

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[3] The record transmitted on appeal does not contain many relevant portions of the trial record, including the pleadings that set forth the manner in which each plaintiff's damages were calculated, the trial testimony of over 40 witnesses who testified by deposition, and many trial exhibits. Rules 10(b) and 11(b) of the Federal Rules of Appellate Procedure make it clear that it is the appealing party's responsibility to ensure that relevant portions of the district court record are transmitted to the Clerk of this court. *See* 8th Cir. R. 11A, 30A. Given the crowded dockets of all the courts in this circuit, the judges of this court will seldom request the clerk of our court to request the clerk of the district court to send us relevant portions of the trial record that the parties have failed to

(Continued on following page)

no plain error in the procedure employed by the district court to resolve damages issues. Stuckey's apparently waived its objections to the specific damage awards in the trial court; in any event, the record on appeal does not permit us to conclude that the evidence was insufficient to support those specific awards. Accordingly the judgment is affirmed with respect to the hourly employees.

IV. Willful Violations and Liquidated Damages

The district court held that the three year statute of limitations is applicable because Stuckey's violations were willful. *See* 29 U.S.C. § 255(a). In addition, the district court held that plaintiffs were entitled to liquidated damages under § 216(b) because Stuckey's failed to prove that the violations were "both in good faith and predicated on such reasonable grounds that it would be unfair to impose . . . more than a compensatory verdict." Stuckey's does not – and could not – challenge these rulings with respect to the hourly paid plaintiffs whose damage awards we have affirmed.

Stuckey's does contend, however, that the district court failed to distinguish between the hourly paid employee violations, as to which Stuckey's only defense was it did not know they were occurring, and the store manager violations, as to which Stuckey's argues that it reasonably relied upon the executive exemption defense.

(Continued from previous page)

transmit. Instead, we consider the appeal on the record as prepared by the parties, which means that relevant omissions normally work to the disadvantage of the appealing party.

We agree that, as to the store managers' willfulness and good faith must be considered in the context of the claimed executive exemption defense. However, as we have reversed and remanded for further consideration of this claimed defense, we decline to consider the willfulness and good faith issues at this time.

V. The Cross Appeal

On their cross-appeal, plaintiffs contend that the district court erred by calculating the store managers' damages based on a 60 hour work week, rather then a 40 hour work week, and that their attorneys' fee award was inadequate. These issues are inextricably tied to the damage awards to the store manager plaintiffs, which we have remanded. Accordingly, we decline to consider the cross appeal issues at this time.

Conclusion

The decision of the district court awarding damages to the hourly paid plaintiffs in the amounts set forth on page 6 of its order dated July 14, 1990 is affirmed. For the reasons stated above, the decision of the district court awarding damages to the store manager plaintiffs is reversed, the award of attorneys' fees to the plaintiffs is vacated, and the cause is remanded for further proceedings consistent with this opinion. Because of the nature and complexity of the issues that may arise upon remand, we leave to the discretion of the district court whether a

new trial, or the receipt of additional evidence on any of these issues, may be appropriate.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 90-2375/2376/2897NI

Gladys Murray, et al, Appellant,	*	Order Denying Petition For Rehearing and Suggestion For Rehearing En Banc
vs.	*	
Stuckey's Inc., et al, Appellee.	*	

Appellee/Cross-Appellant's suggestion for rehearing en banc, has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc. Judge McMillian dissented on executive exemption issue only.

Petition for rehearing is also denied.

September 19, 1991

Order Entered at the Direction of the Court.

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

071289D3

SIDNEY MURRAY and GLADYS MURRAY, on behalf of themselves and all others similarly situated, Plaintiffs, vs. STUCKEY'S, INC. and PET INCORPORATED, Defendants.	NO. C 85-4085 MEMORANDUM OF LAW AND ORDER (Filed Jul. 17, 1989)

On May 31, 1985, plaintiffs commenced this class action under the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.*, seeking to recover additional overtime compensation and compensation for hours claimed to have been worked "off the clock." This matter was tried to the court from February 21, 1989 through February 25, 1989. The present action consists of claims by forty-five (45) former "managers" and "hourly employees" of various Stuckey's stores throughout the country. Claims of fifteen (15) of the original plaintiffs have been settled by the parties.

In rendering its decision, the court has considered the deposition testimony of forty-three (43) former "managers" and spouses, who were hourly employees, as well as deposition testimony of former regional managers and

executives of Stuckey's. Three (3) of the plaintiffs testified during the trial, as well as six (6) former Stuckey's executives and regional managers. Having considered all of the testimony, stipulations, and exhibits introduced, the court concludes that:

1. The plaintiffs (both "managers" and "hourly employees") are entitled to recover additional overtime compensation and compensation for hours that have been worked "off the clock;"

2. The parties are to submit a report as to said damages for each individual plaintiff within thirty (30) days of the receipt of this order;

3. Plaintiffs are not entitled to compensation for "sleep time;"

4. The applicable statute of limitations for damages shall be three years

5. Both defendants, Stuckey's, Inc. and Pet Incorporated, are deemed to be employers during the time they were in charge and are found responsible

6. Plaintiffs Warren Kajander and Robin Kajander are entitled to recover the sum of $1,980.90 plus interest as provided by law for medical expenses incurred during the pregnancy of Mrs. Kajander; and

7. The parties are to submit a report as to plaintiffs, reasonable attorney fees and costs of this action within thirty days of receipt of this order.

I. FINDINGS OF FACT

A. Background Information.

1. This action was filed on May 30, 1985 under the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. § 201, *et seq.*, to recover minimum wages, unpaid wages, and overtime benefits.

2. After the filing of this action by the two named plaintiffs, fifty-eight additional persons have filed consents herein to become party plaintiffs. Dismissals have been filed with respect to fifteen plaintiffs and there are [sic] now remain [sic] forty-five plaintiffs.

3. This court has jurisdiction pursuant to 28 U.S.C. § 1337.

4. Stuckey's, Inc. ("Stuckey's") began as a corporation at some time prior to 1972. Stuckey's is a duly organized and existing corporation under the laws of Delaware and is qualified to do business in Iowa. It does business in Little Sioux, Iowa and other locations throughout the United States where it is or has been engaged in the operation of filling stations with restaurant facilities attached.

5. In 1972, Pet, Incorporated ("Pet") purchased all of the stock in Stuckey's. Pet is a duly organized and existing corporation under the laws of Delaware and is authorized to do business in Iowa.

6. Stuckey's is a wholly-owned subsidiary of Pet.

7. Both before and after the purchase, Stuckey's hired and fired employees for the outlets, supervised and controlled the work and work schedules, determined rate

and method of payment, and maintained employment records.

8. In most cases, Stuckey's staffed the stores with married couples who lived permanently on the site. The Stuckey's roadside stores sold candy, gasoline, novelties, convenience items, as well as food from a snack bar. Each store was an independent location and, by necessity, was geographically separated from other company property. In most cases the stores were in locations along the interstates or major highways.

9. The labor budget for each store was based on volume of business done by that store, and the labor budget differed from store to store. In addition, store hours, frequency and size of alleged night deliveries, number of employees, sleep allegedly had, and hours claimed to have been worked by plaintiffs differed from store to store. Weather conditions, time of year, and other factors also affected store operations.

10. At all times material hereto, defendants employed Plaintiffs Sidney Murray and Gladys Murray in and about Stuckey's Pecan Shops located in Little Sioux, Iowa, and Randall, Iowa. Said plaintiffs were involved in selling, handling, or otherwise working on goods transported in interstate commerce and, therefore, were engaged in commerce or the production of goods for commerce within the meaning of the Fair Labor Standards Act.

11. Sidney Murray and Gladys Murray (and all other plaintiffs) have been engaged by Stuckey's, at all times material herein, in the business of operating a gasoline service establishment, together with other retail

operations, with an annual gross line of sales for business done of not less than $250,000.00 exclusive of excise taxes at the retail level separately stated. Stuckey's is an enterprise engaged in commerce within the meaning of section 3(s) of the Act.

12. "Managers" were given specific labor schedules providing for a maximum of sixty hours of work for the manager to be compensated for by salary. All other employees were paid on an hourly rate.

13. The manager's spouse was an hourly employee and was in most cases scheduled to work forty hours.

14. In Stuckey's training program, store managers were instructed that overtime was to be paid to hourly employees for all hours worked over forty hours. However, the court finds that said policy was rarely followed.

15. Although defendants routinely hired husband and wife teams to operate each of their individual stores, one was designated as a "manager." The manager was paid a weekly salary, typically $210.00 per week, but ranging from $180.00 per week to $300.00 per week. The other spouse was paid at an hourly rate, typically $3.45 per hour.

16. Store managers and spouses resided permanently on the employer's premises. They were provided with a two-bedroom apartment with a full bath, kitchen, and living room.

17. The duties of the "manager" and "hourly employee" were essentially the same. For example, Russell Renecker testified that he and his wife, Carol, were hired as a "husband-and-wife team." Mr. Renecker,

a former manager, stated that "I did whatever was necessary cleaning, painting, pumping gas, et cetera – there was no essential difference in her [Carol Renecker's] duties and mine." Jeannette Petrmoulx Arbuckle also testified that she and her husband were hired as a team. Mrs. Arbuckle testified that "I was hired as a manager . . . our duties were the same." Gladys Murray also testified that she and her husband were hired as a husband-and-wife team. Initially, Mrs. Murray was hired as the manager and her husband was an hourly employee. However, on December 21, 1984, Mrs. Murray fell on the ice while performing her duties at Stuckey's and had to undergo two surgeries. Thereafter, Mr. Murray was designated as manager. However, Mrs. Murray testified that "the regional manager for Stuckey's still called for me. I performed the daily reports. I ordered. I did the paperwork in the hospital. I complained [of the situation]. They [Stuckey's] told me to get the job done or they would get someone else."

Although Stuckey's claims that there was a difference in the roles of the manager and the spouse employee, the court is not so persuaded from the evidence adduced at trial and in depositions.

18. The husband-and-wife teams were routinely told by their regional managers that they were to do whatever was necessary to get the job done and to work whatever number of hours it took to get the job done. For example, Richard Deninger, a former regional manager, testified:

> Q. Sixty. Isn't it a fact, Mr. Deninger, that you have told your store managers that they are

required to work whatever number of hours it takes to get the job done?

A. That's true.

(Deninger Dep., p. 54, lines 18-22.)

19. The spouses of the managers were routinely told that they were not to record more than forty hours (in a few instances, forty-four) as the number of hours worked. Managers were also told to report only forty hours as the number of hours they worked no matter how many more hours were actually worked.[1]

At the trial, the deposition of Floyd Caskey, a former manager and regional manager, was read into evidence. Mr. Caskey testified as follows:

Q. Sure. You say that you were told to report – this is in part C. "I was told to report my work as forty hours per week regardless of the hours actually worked." Who did you report that to?

A. Regional or – yeah, regional manager.

Q. Didn't you at times get schedules, Mr. Caskey, that would have up to sixty hours that you were expected to work?

A. Right, but I was always – when they came through with our checks they would say right on the check for forty hours.

Q. It said that on the check?

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[1] As a result, many employees punched the clock as if they were done for the day, and then continued working "off the clock" to get the work done.

A. Yes, sir. As I remember, it was on the check or on the sheet. There was a computer sheet that came with it that said forty hours.

Q. And it's your testimony that you didn't work forty hours a week?

A. No, sir, I worked more than forty hours a week.

Q. How many hours a week would you have worked while you were at the old fort [sic] store?

A. It would vary. I worked anywhere from sixty up to one hundred or more.

(Caskey Dep., p. 84, lines 18-25; p. 25, lines 1-16.) Mr. Caskey also testified as follows:

Q. Any other employee work overtime at the old fort store?

A. Not that I remember.

Q. If you would have – if someone would have worked overtime and you would have put it down on the time card, or the employee would have put it down on the time card, would they have been paid for it?

A. At that time, they would have, yes, sir. And I would have got chewed out or lost my job probably the next time it was done.

Q. But if somebody did turn in overtime while you were at old fort [sic] they would have been paid for it?

A. The first time, yes.

Q. Somebody might have said something to you?

A. Yes, I would have been reprimanded for it.

Q. Did that ever happen?

A. No, sir. I did go over my sales, I think, once, and I was told – I mean labor once, but this was straight hours; it wasn't overtime hours; and I was told it wasn't to happen, and this was, I think, when I had some painting and stuff to do.

(Caskey Dep., p. 43, lines 5-25.)

Richard Deninger, another former regional manager for Stuckey's, testified.

Q. Going back to these computer printouts which show forty hours for the manager. Do you have any reason to believe that those managers were working only forty hours per week?

A. No.

Q. In fact you would believe they were working considerably more than that, would you not?

A. Sure.

Q. Based on the duties?

A. Sure.

Q. That were assigned to them?

A. Sure.

Q. What would your best estimate be as to the number of hours the manager was working, seventy, eighty?

A. No, I don't think that much.

Q. What would your best estimate be?

Mr. LaSeur: You want to specify where?

By Mr. Nymann: Q. At Little Sioux?

A. Sixty.

(Deninger Dep., p. 53, lines 23-25; p. 54, lines 1-17.)

Marvin Mangers, a former manager and regional manager for Stuckey's, testified:

> Q. And at the same time, the managers were being told to report forty to St. Louise [sic], is that correct?
>
> A. Correct.

(Manger Dep., p. 23, lines 17-19.)

In her deposition, Carol Renecker, a spouse hourly employee, testified:

> Q. What were you told about keeping track of hours?
>
> A. I was – you know, I had forty hours and I would have to clock out, you know, at three and, you know, if I was off or if they were busy, I had to stay there until, you know, we were there or got caught up or whatever. And if I needed to go get some stuff at the store, I'd have to go, you know, go to the bank or go to the grocery store to, you know, pick up the lettuce or whatever we would need at the time; and that would be after I was clocked out, but I'd always have to make sure I clocked out at the right time.
>
> Q. Who told you that?

A. Well, my husband did because he was told that, that he couldn't go over, you know, the scheduled work hours that, you know –

Q. Was it your husband who would instruct you to do work after you'd clocked out?

A. Yeah, just whoever – you know, he was told that, you know, we had to get it done.

(Renecker Dep., p. 8, lines 5-25.)

20. With respect to the plaintiffs who were paid a weekly salary, computer printouts prepared by defendants registered forty as the number of hours for which that weekly salary was intended. However, managers who were paid a weekly salary were told that the salary was to compensate them for up to sixty hours of work per week. (*See* Exhibits 21-24.)

21. In addition to receiving weekly salary, the following managers were paid bonuses.

Name	Year Bonus Paid	Amount
Harley Blair	1983	$1,256.00
Deborah Hoyt	1983	2,433.00
Warren Kajander	last 13 weeks 1983	673.00
Carol Lewis	last 6 months 1983	1,447.00
Gladys Murray	1983	3,257.00
Jeannette Petrimoulx Arbuckle	1983	3,121.00
Mary Cope	1983	1,912.00
Randy Bushnell	last 6 months 1983	1,677.00
Stanley Dixon	first 6 months 1983	1,475.00
Loren Jacoby	1983	1,075.00
Thomas Miller	first 3 months 1983	410.00

Name	Year Bonus Paid	Amount
Donald Phillips	1983	562.00
Joy Powers	1983	1,885.00
Arthur Stotts	last 6 months 1983	1,638.00
David Tompkins	1983	2,968.00
Russell Renecker	last 6 months 1983	2,340.00
Eugene Rutledge	1983	3,767.00
Laurence Taylor	1983	2,700.00

22. Plaintiffs received their paychecks from Defendant Pet. For Example, in his deposition, Marvin Mangers testified:

Q. While you were employed as a regional manager, from whom did you get your paycheck?

A. From Pet.

Q. That would be Pet, Incorporated?

A. Pet, Incorporated.

Q. Would that be during all the time you were employed as a regional manager?

A. As a regional manager, yes.

Q. Who issued the checks for the store managers?

A. A lot of years I was there, they got them from Pet. They were mailed from Pet.

Q. Do you remember about how long that was?

A. Probably my last year and a half.

Q. So that would go back about three years?

A. Yes.

Q. What about the manager's spouse, where did the check –

A. Same place.

Q. It came from Pet?

A. Yes, all payroll.

(Mangers. Dep., p. 8, lines 10-25; p. 9, lines 1-3.) The above testimony was typical of several other witnesses as well.

23. Plaintiffs received various employee benefits from Pet. For example, Pet provided health insurance benefits to Stuckey's employees.

24. Plaintiffs received a handbook entitled "You and Pet," which stated on its front page that "we are pleased that you are part of the Pet team." (Ex. 14.)

25. Plaintiffs received an employee magazine, sometimes referred to as a house organ, entitled "Pet Magazine." (Ex. 15.)

26. George Davis, the Senior Vice President of Store Operations of Stuckey's, reported to and took direction from an officer of Pet.

27. Under the FLSA, "executives" are exempt from application of the Act if they spend a certain amount of time where their primary duties are management-related as set forth in 29 C.F.R. § 541.1.[2] The time employees spend where their primary duties are not management-

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[2] *See* p. 21, *infra*, for full text of this section.

related are termed "nonexempt duties." Plaintiffs who received a weekly salary (managers) spent from 65-90% of their time performing nonexempt duties.

28. With respect to plaintiffs who received a weekly salary (managers), and are claimed by defendants to be exempt, the defendants have failed to sustain their burden of proof that the primary duty of those employees was management. For example, Russell Renecker, a former manager and regional manager, testified: "I was not free to act with Pet. Pet tied my hands as to discretion. In the latter part of '81' it started. They decided everything. . . . Management was turned over to Pet. Pet's running the show, before it had been Stuckey's running show." Similarly, Floyd Caskey, another former manager and regional manager, testified that he had to check with a regional manager to make certain he could fire an hourly employee. (*See* Floyd Caskey Dep., p. 19, lines 15-23.) Further, the Stuckey's Operational Manual (Exhibit A), specifies that regional managers are "accountable for the operation of all company operated stores," and describe the regional manager's duties as including:

> customer service, product quality, cleanliness, safety, sanitation, standards of operations, budgeting sales and expenses, public image of the stores, expense controls, daily operating procedures, obtaining supplies and equipment, maintaining equipment and real property, store management training and developing manpower capabilities to meet future expansion needs as well as recruiting manager trainees.

Exhibit A. In comparison, the same manual lists nine duties for which store managers hold primary responsibility, three of which deal with cleaning duties, others covering keeping supplies stocked, handling daily receipts "in accordance with Accounting Department or Regional Managers' instructions," answering correspondence, keeping the price book current, and training employees. (Exhibit A.)

Based on the aforementioned testimony and that of various others, the court is persuaded that the "managers" did not have management as a primary duty. In essence, the evidence demonstrated that the "managers" simply took orders and had little, if any, real involvement as managers.

29. With respect to plaintiffs who received a weekly salary (managers), and are claimed by defendants to be exempt because their primary duties were managerial or because they were in "sole charge," the defendants have failed to sustain their burden of proof that such employees are exempt from the overtime provisions of the Fair Labor Standards Act.

30. Although the defendants did pay overtime when informed by store managers that overtime had been worked, the court finds that plaintiffs were pressured into falsifying hours of work as it pertained to overtime. Defendants' witnesses testified that labor schedule guidelines were "scientifically" developed for Stuckey's and were designed to provide sufficient hours for each store to be adequately staffed based on sales volume. Defendants also contend that regional managers made additional labor money available to a store if he or she

requested it and it was justified. However, the testimony with regard to the practicalities of the labor schedule was disputed between the parties. Plaintiffs testified that the spouse and manager were each required to work anywhere from forty-five (45) hours per week up to one hundred twenty (120) hours per week to get the work done with the few other employees they could hire under the guidelines. Former Stuckey's regional managers and vice presidents testified that it would be unnecessary for managers to work in excess of sixty (60) hours per week or spouses to work in excess of forty (40) hours per week. It is relevant to note here that shortly after this lawsuit was filed, the labor schedules were increased by Stuckey's, which would further tend to support plaintiffs' contention that they were too low.

The court disagrees with the position advanced by Stuckey's regional managers and vice presidents set forth above. The court is persuaded that there were not sufficient hours projected into the labor schedule. Therefore, employees were required to work in excess of scheduled hours. The court also finds that the defendants had knowledge that plaintiffs were working in excess of their scheduled hours or in excess of the overtime for which plaintiffs were compensated by defendants. This was specifically known by many regional managers. Such knowledge is imputed to defendants. Further, the facts indicate that although some managers knew that overtime hours were being worked, said managers chose to avoid the issue altogether. (*See* Del Roush Dep., p. 43, lines 11-16; Floyd Caskey Dep., p. 62, lines 11-18; Donald Scott Dep., pp. 10-13; David Tompkins Dep., p. 9, lines

13-25; p. 10, lines 1-12; Rita Miller Dep., p. 12, lines 19-21; Georgina Philips Dep., p. 9, lines 10-20.)

The facts also revealed that several "managers" resorted to hiring hourly employees and/or others to assist them in performing various tasks and paid for the additional off-the-clock services out of their own pockets. (*See* Floyd Caskey Dep., p. 23, lines 15-16; Gladys Murray and Russell Renecker also so testified at trial.)

31. In response to interrogatories, the defendants acknowledged four (4) investigations by the Wage and Hour Division of the Department of Labor with respect to Stuckey's employees.

32. In response to Plaintiffs' Fifth and Sixth Requests for Admissions, defendants admitted numerous additional previous investigations, violations, and promises of future compliance with the Fair Labor Standards Act.

33. As a result of the investigation with respect to the location of Stuckey's, Inc. at Saint Clair, Michigan, the Wage and Hour Division of the United States Department of Labor found back wages due in the amount of $7,283.00 for two "managers." Thereafter, Stuckey's assured the Wage and Hour Division of future compliance with the Act.

34. In 1981 and again in 1984, investigations were conducted by the Wage and Hour Division of the United States Department of Labor with respect to Stuckey's stores located in Elko, Minnesota and in Carthage, Missouri. Said investigations involved charges of employees working off the clock. As a result of the investigations,

back wages were paid and future compliance with the Wage and Hour law was assured by the defendants.[3]

35. In the instant case, Johnny Brady, who was in charge of compliance with the wage and hour law, called the attention of the president of Stuckey's to the possible violations of the wage and hour law. *See* Plaintiffs' Exhibit 9 at #17 and Defendants' Exhibit R.

36. Based upon the foregoing Findings of Fact, the court finds that the violations of the Fair Labor Standards Act by the defendants were willful. Further, the court finds that defendants' failure to comply with the wage and hour law as it pertains to hours worked off the clock by "managers" and "hourly employees" demonstrates that the defendants failed to act in good faith and had no reasonable grounds for believing that they were complying with the Act. This court finds that the applicable statute of limitations is three years.

37. The court finds that neither a contract or an express agreement existed between Stuckey's and its employees providing for compensation for sleeping time.

38. The facts clearly demonstrate that managers were entitled to receive one day off every week and spouses were entitled to receive two days off each week. Additionally, the record reveals that the plaintiffs

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[3] The court is aware that these violations generally did not include "managers." However, based on all the evidence, the court concludes that the defendants knew they showed reckless disregard to the pertinent regulations and statutes involved as they pertained to "managers."

received vacation with pay each year. The court is persuaded that the plaintiffs herein do not expect to receive additional compensation for the weeks that they were on vacation. For example, Mrs. Arbuckle testified: "I can't claim for weeks that I was on vacation . . . the store wasn't open on Christmas." Thus, the court finds that plaintiffs should not be awarded any back pay for two weeks of vacation time or for Christmas Day.

39. The vast majority of the plaintiffs herein testified that they were told that they were to be on call twenty-four hours per day. However, the court is not persuaded that plaintiffs were actually told that they had to be physically present on the premises of the store twenty-four hours a day, seven days a week, fifty-two weeks a year. For example, Mrs. Arbuckle specifically testified "I was free to leave at any time if I left a [phone] number (where I could be reached) and had enough hours left in my allotment to hire someone." *See also* the depositions of Dale Roush, p. 36, lines 10-20, and Steven Lake, p. 33, lines 4-17. Based on the foregoing testimony, the court finds that there is a distinction between being required to be physically present at a store and having to leave a phone number where an employee could be reached. The court is persuaded that the latter situation is certainly typical of numerous jobs and, although it may be somewhat of an inconvenience to an employee to be required to leave a phone number where he or she can be reached in an emergency situation, it is not a wholly unreasonable request by the defendants herein. Thus, the court finds that, in reality, Stuckey's did not require their employees to be "on call twenty-four hours per day."

Accordingly, the court finds that plaintiffs were free to engage in personal activities and did so.

40. There were several witnesses who testified that Stuckey's routinely delivered candy at odd hours in the middle of the night and expected the manager to have enough help to quickly unload the truck. However, in 1982, Stuckey's began using a different trucking service, McLeans. There was testimony that McLeans routinely made deliveries during store hours and night deliveries came almost completely to a stop. *See* the deposition testimony of Richard Deninger, p. 85, lines 1-19. This finding is also supported by the deposition testimony of Donald Philips, a former store manager, who testified:

> Q. Now, when Stuckey's was delivering your candy, was the candy generally delivered during store hours?
>
> A. No, sir.
>
> Q. When was that usually delivered?
>
> A. It was always after midnight until, I think later we probably got one that was five o'clock in the morning.
>
> Q. How often would candy be delivered?
>
> A. Once a month with Stuckey's.
>
> Q. Now when McClains [sic] started delivering in Continental Divide, when you started getting deliveries from McClains [sic] –
>
> A. Yes, sir.
>
> Q. – would they usually deliver food and candy during store hours?
>
> A. Yes, sir.

Q. How often would they deliver food and candy?

A. Once a week.

Q. How often would they come on a yearly basis not during store hours?

A. McClains [sic]?

Q. Yes.

Q. [sic] I think probably only two times that they were late and that was on account of due to the weather.

(Philips Dep., p. 9, lines 23-25; p. 10, lines 1-24.) Based on the foregoing testimony, the court finds that plaintiffs' sleep was interrupted infrequently by night deliveries during the time that McLeans made said deliveries. Therefore, except as mentioned above, the court finds that plaintiffs' sleep was not interrupted by night deliveries during the time relevant to this lawsuit and, therefore, that plaintiffs shall not be compensated for their claim for interruption of sleep time.

41. The record indicates that from September 15, 1983 to July 15, 1984, Warren Kajander and Robin Kajander were employed by the defendants and while so employed they were covered by health care expense benefits provided to employees of the defendants, including pregnancy benefits. These plaintiffs did everything they could to convert their group insurance so that the medical expense of the pregnancy of Robin Kajander would be covered. The court finds that the failure of defendants to arrange the conversion of said group insurance was through no fault of the Kajanders and awards the

Kajanders the sum of $1,980.90 plus interest on said claim. *See* Warren Kajander Dep., pp. 25-28.

42. The parties have advised the court during trial that, in the event that the court holds in favor of the plaintiffs, they believe they can agree upon a calculation of the amounts due each plaintiff. The court is currently persuaded that the parties should meet and endeavor to reach an accord as to the amounts due each plaintiff based on the rulings set out herein and then prepare an exhibit reflecting the same and file that within thirty days of receipt of this order. The court is further persuaded that it does not have an adequate record before it concerning the precise damages sustained by each plaintiff. Therefore, if the parties cannot reach a mutual agreement as to damages, the court will consider the damages sustained herein in light of legal precedents hereinafter set out, including the possibility of taking additional testimony.

43. The court finds that plaintiffs are entitled to their reasonable attorney fees and costs. Accordingly, the court hereby orders the plaintiffs to submit an itemized claim for attorney fees and costs within twenty days of receipt of this order. Within ten days thereafter, the defendants shall file any objections they have to the claimed fees and costs.

44. The parties are hereby instructed to use the formula set out in the Conclusions of Law section which follows as it pertains to calculation of damages.

II. CONCLUSIONS OF LAW

A. Claims of Manager Plaintiffs.

1. Primary Duty Exception.

The issue before the court is whether or not the manager plaintiffs are exempt employees under the Fair Labor Standards Act (FLSA). Plaintiffs claim that they were not "managers" but, rather, were nothing more than "glorified gas boys" and, as such, are not exempted by the FLSA. Defendants claim that the plaintiff managers are exempt under the provisions of the FLSA because their "primary duties" were management. *See* 29 U.S.C. § 213(a)(1).

Title 29, Code of Federal Regulations, section 541.102, reads as follows:

> (a) In the usual situation the determination of whether a particular kind of work is exempt or nonexempt in nature is not difficult. In the vast majority of cases the bonafide executive employee performs managerial and supervisory functions which are easily recognized as within the scope of the exemption.
>
> (b) For example, it is generally clear that work such as the following is exempt work when it is performed by an employee within the management of his department or the supervision of the employees under him: interviewing, selecting, and training of employees; setting and adjusting the rates of pay and hours of work; directing their work; maintaining their production or sales records for use in supervision or

> controls; appraising their productivity and efficiency for the purposes of recommending promotions or other changes in their status; handling their complaints and grievances and disciplining them when necessary; planning the work; determining the techniques to be used; apportioning the work among the workers; determining the type of materials, supplies, machinery or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety of the men and the property.

Additionally, the Secretary of Labor has established a test to apply in the determination of whether or not managers are exempt under the FSLA. The "test," codified at 29 C.F.R. § 541.1, reads as follows:

> The term "employee employed in a bona-fide executive . . . capacity" in section 13(a)(1) of the Act shall mean any employee:
>
> (a) whose primary duty constitutes of the management of the enterprise in which he is employed or of a customarily recognized department of a subdivision thereof; and
>
> (b) who customarily and regularly directs the work of two or more other employees therein; and
>
> (c) who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and

(d) who customarily and regularly exercises discretionary powers; and

(e) who does not devote more than 20%, or, in the case of an employee of a retail or service establishment who does not devote as much of 40%, of his hours of work in the work week to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (d) of this subsection: *provided*, that this paragraph shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment, or who owns at least a 20% interest in the enterprise in which he is employed; and

(f) who is compensated for his services on a salary basis at a rate of not less than $155.00 per week (or $130.00 per week, if employed by other than the federal government in Puerto Rico, the Virgin Islands, or American Samona), exclusive of board, lodging or other facilities: *provided*, that an employee who is compensated on a salary basis at a rate of not less than $250.00 per week (or $200.00 per week, if employed by other than the federal government in Puerto Rico, the Virgin Islands or American Samona), exclusive of board, lodging, or other facilities, and whose primary duty consists of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein, shall be deemed to meet all the requirements of this section.

It is necessary for the court to apply both the "long test," subparts (a) through (e), and the "short test," subsection (f), in determining whether managers in this case are exempt under the FLSA. The court has applied the long test for those earning less than $250.00 per week and the short test for those earning more than $250.00 per week. It is undisputed that all managers of Stuckey's stores were paid at least $155.00 per week. Evidence demonstrates that pay rates ranged from $180.00 per week to $300.00 per week.

Under either test it is important to determine if an employee's "primary duty" was management. Section 541.103 of Title 29, Code of Federal Regulations, sets forth the factors to consider for the "primary duty" analysis. Section 541.103 reads as follows:

> A determination of whether an employee has management as his primary duty must be based on all the facts in a particular case. The amount of time spent in the performance of the managerial duties is a useful guide in determining whether management is the primary duty of an employee. In the ordinary case it may be taken as a good rule of thumb that primary duty means the major part, or over 50%, of the employee's time. Thus, an employee who spends over 50% of his time in management would have management as his primary duty. Time alone, however, is not the sole test, and in situations where the employee does not spend over 50% of his time in managerial duties, he might nevertheless have management as his primary duty if the other pertinent factors support

> such a conclusion. Some of these pertinent factors are the relative importance of the managerial duties as compared with other types of duties, the frequency with which the employee exercises discretionary powers, his relative freedom from supervision, and the relationship between his salary and the wages paid other employees for the kind of nonexempt work performed by the supervisor.

Defendants contend that the evidence presented at trial demonstrated that one manager was hired by Stuckey's for each store. Also, defendants argue that each manager was responsible for all aspects of his or her store. The facts indicated that the store manager lived at the store and reported to a regional manager who did not live at the store. Defendants contend that although the regional manager made occasional visits to each store and was in contact by telephone on a weekly basis, it was not the regional manager, but the store manager, who controlled the daily operations of the store. For example, defendants argue that Gladys Murray, Jeannette Petromoulx Arbuckle, and Russell Renecker all testified that they hired and fired employees, trained, supervised, and disciplined employees, maintained inventory, produced daily, weekly, and monthly financial reports, and supervised other aspects of store operations. Based on these facts, defendants argue that the managers are "executives" under 29 U.S.C. § 213(a)(1). Further, defendants argue that despite the testimony of the managers that they performed various routine duties and were "nothing more than glorified gas boys," the fact that their primary duty was management requires that they be exempt from coverage under the FLSA.

Defendants contend that their position is in line with numerous cases in which employees performed similar tasks and were vested with the same responsibilities as the store managers employed herein. For example, in *Tippie v. Affordable Ends,* 24 W.H.Cases 975 (W.D. Okla. 1980), husband-and-wife teams were hired to manage motels for the employer. They were required to live on the motel premises and were not permitted to move to private dwellings. *Id.* at 979. The managers' duties in *Tippie* included answering telephone calls; preparing reports and following procedures set out in the operations manual; selecting, training, and supervising employees (including their spouses); light, general maintenance of the entire grounds and building; general maintenance of motel equipment; general grounds cleaning; purchasing supplies as directed; and accepting responsibility for all incidents that arose at the motel. *Id.* Thus, defendants argue that the managers in *Tippie,* like the managers in this case, were operating all aspects of the motel for their employer. *See also Lyles v. K-Mart Corp.,* 519 F. Supp. 756, 761 (M.D. Fla. 1981) (despite employees' claims that they spent 80-90% of time performing nonexempt work, the court focuses on the overall employment picture in which the same employees engaged in managerial duties such as selecting and training of employees, directing their work, maintaining their production or sales records for use and supervision or control, handling complaints and grievances and disciplining employees when necessary, planning the work needed to be done, determining the techniques to be used, and apportioning work among employees); *Wirtz v. Arcata Plywood Corp.,* 18 W.H.Cases 720 (E.D. Cal. 1969) (exempt manager of data

processing department spent very little time actually directing other employees, but was nevertheless the only manager of the department and the only person who gave department employees their work instructions).

Plaintiffs point out that the burden of proving the applicability of the executive exemption is upon the defendants. Plaintiffs further contend that the exemption is to be applied only in those clearly and unmistakably within the terms and spirit of the exemption. *See Lyles v. K-Mart Corp.*, 519 F. Supp. 756, 760 (M.D. Fla. 1981); *Donovan v. Williams Chemical Co., Inc.*, 682 F.2d 185, 191 (8th Cir. 1982); *Brock v. Norman's Country Market, Inc.*, 835 F.2d 823 (11th Cir.), *cert. denied*, 108 S.Ct. 2845 (1988). Plaintiffs further contend that defendants have failed in their burden of proof to show that the primary duty of the "so-called managers" was management. Plaintiffs argue that the evidence herein demonstrates that their primary duties were not management of the stores and that there were not any real differences in the duties of managers and their spouse hourly employees. Plaintiffs further argue that the evidence showing "no real difference" is reinforced by the fact that, in a number of instances when a "manager" became ill or was injured, said manager was replaced by his or her spouse who then acted as "manager."

The court is persuaded that plaintiffs, argument has merit. Accordingly, the court finds that there were little, if any, differences in the duties of managers and their spouse hourly employees. The court also finds that managers and their spouse hourly employees were equally capable of performing all duties and generally shared these functions. Further, the court is persuaded that

defendants also recognize the fact that there were "no real differences" between the roles played by their managers and spouse employees. For example, the evidence at trial revealed that Stuckey's assigned Gladys Murray, the store manager of a Stuckey's located in Randall, Iowa, to fill in as a temporary manager of a Stuckey's store located in Elko, Minnesota. Mrs. Murray was reassigned to the Elko store while the manager of the Elko Stuckey's took leave for vacation. Thus, while Gladys Murray served as the temporary manager in the Elko store, the Randall Stuckey's was left without a "manager." The evidence further revealed that Mr. Murray, an hourly employee, functioned as manager of the Randall, Iowa Stuckey's in his wife's absence. Further, although Mr. Murray functioned as the Randall Stuckey's manager, he was paid an hourly wage during that time. Thus, based upon these facts and other relevant evidence adduced at trial, the court is persuaded that Stuckey's perceived "no real differences" in the primary duties of its managers and spouse hourly employees.

The court is persuaded that Stuckey's regional managers served as the "real managers" of their stores. The evidence demonstrates that regional managers were the individuals who made the vast majority of the "significant decisions" concerning Stuckey's operations. For example, the regional managers decided the number of employees needed at a particular store; whether overtime hours were necessary (the evidence showed that if overtime was turned in by a particular store manager, the regional manager would reprimand said manager); store

hours; gasoline prices; from where to order various supplies; et cetera. For support of this, *see* Exhibits A-7, A-19, A-21, I, N, and Q.

Although the defendants cite numerous cases which they believe lend support to their position, the court believes that the decision set forth in *Brock v. Norman's Country Market, Inc.*, 835 F.2d 823 (11th Cir.), *cert. denied*, 108 S.Ct. 2845 (1988), is most applicable to the facts herein. In *Brock*, at 826, the court stated:

> The burden of proving the applicability of the executive exemption is upon the defendant. The exemption is to be applied only to those clearly and unmistakably within the terms and spirit of the exemption. [Citation omitted.] The trial court held Norman did not discharge his burden of proof, and in doing so made many credibility determinations.
>
> The district court stated: "Because defendants have failed to sustain their burden of proving that the primary duty of these employees was the management of their departments, the court must conclude that they are not exempt as executives under either of the regulations tests." Although it was not necessary for the district court to examine Norman's claims under both tests, it nevertheless did. [Footnote omitted.] It has been well settled that the district court has the opportunity to observe the witnesses and their demeanor, and is, therefore, in the best position to make credibility determinations, subject only to the clearly erroneous rule of Federal Rule of Civil Procedure 52(a). [Citations omitted.]

> After carefully reviewing the record, we agree with the district court's determination. The employees in question were nothing more than "working foremen." Although each of them may have had a duty which is normally recognized as that of a manager's responsibility, looking at each one individually and at the actual work performed, we cannot say they qualified as a "bonafide executive."

As set out on page 22, *infra*, section 541.103 of Title 29, Code of Federal Regulations, reads: "A determination of whether an employee has management as his primary duty must be based on all the facts in a particular case." The court is persuaded that the facts of the instant case clearly warrant a finding that the manager plaintiffs, primary duties were not management. Accordingly, the court finds that the defendants have failed in their burden of proof as it relates to "the primary duty exception."

2. Sole Charge Exception.

Defendants also argued at trial that the "manager" plaintiffs are exempt under the FLSA because they were in "sole charge" of the stores as set forth in 29 C.F.R. § 541.1(e).[4] Based upon the same reasoning as set forth in the court's analysis of the primary duties exception, the court finds that the "sole charge" exception is not applicable to the facts herein. Therefore, the court will not further belabor the point.

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[4] *See* p. 21, *supra*, for full text of this section.

B. Claims of Hourly Employees.

In the instant case, spouse hourly employees claim that they are entitled to be compensated for additional hours for work "off the clock." In *Anderson v. Mount Clemens Pottery Co.*, 328 U.S. 680, 686-88 (1946), the Court stated:

> The Sixth Circuit Court of Appeals made a careful examination of the master's findings and conclusions, holding that they were all supported by substantial evidence and were not clearly erroneous. It stated that the district court erred in failing to accept the finding of the master that productive work did not actually start until the scheduled time and that the formula devised for computing additional productive work was unsustainable because based upon surmise and conjecture. The Court of Appeals further held that the burden rested upon the employees to prove by a preponderance of the evidence that they did not receive the wages to which they were entitled under the Act and to show by evidence rather than by conjecture the extent of overtime work, it being insufficient for them merely to offer an estimated average of overtime work. The cause of action accordingly was ordered to be dismissed. 149 F.2d 461.
>
> But we believe that the Circuit Court of Appeals, as well as the master, imposed upon the employees an improper standard of proof, a standard that has the practical effect of impairing many of the benefits of the Fair Labor Standards Act. An employee who brings suit under section 16(b) of the Act for unpaid minimum wages or unpaid overtime compensation,

together with liquidated damages, has the burden of proving that he performed work for which he was not properly compensated. The remedial nature of this statute and the great public policy which it embodies, however, militate against making that burden an impossible hurdle for the employee. Due regard must be given to the fact that it is the employer who has the duty under section 11(c) of the Act to keep proper records of wages, hours and other conditions and practices of employment and who is in position to know and to produce the most probative facts concerning the nature and the amount of work performed. Employees seldom keep such records themselves; even if they do, the records may be and frequently are untrustworthy. It is in this setting that a proper and fair standard must be erected for the employee to meet in carrying out his burden of proof.

When the employer has kept proper and accurate records, the employee may easily discharge his burden by securing the production of those records. But where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes, a more difficult problem arises. The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precide [sic] extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act. In such a situation we hold that an employee has carried out his burden if he

> proves that he has in fact performed work for which he was improperly compensated and if he produces the sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.

See also Rural Fire Protection Co. v. Hepp, 266 F.2d 355, 359 (9th Cir. 1966).

In *Brennan v. General Motors Acceptance Corp.*, 482 F.2d 825, 829 (5th Cir. 1973), the court stated:

> The trial court found that "the defendants, district representatives, field representatives, and certain of the side telephone collection men regularly worked in excess of forty hours per week, but with rare exceptions, were only allowed to turn in, record, and be paid for forty to forty-two hours." We interpret this finding to mean that as a general rule this type of GMAC employee worked unreported overtime hours. The court's finding is not clearly erroneous, for evidence in the record supports such a conclusion. Sixteen employees testified that they worked unreported hours of overtime. Furthermore, a government investigator interviewed six employees, examined GMAC records and concluded that GMAC employees in this type of job consistently failed to report all of the overtime hours worked. From these two sources, the

> employees, testimony and the investigator's testimony, the trial court might well have concluded that plaintiff had established a prima facie case that all thirty-seven employees had worked unreported hours. At that point the burden of proof shifted to the defendant, and it was his obligation to show which of the employees had reported all overtime hours. Appellant produced ten such employees and the trial court accordingly omitted them and one other from its award. The ten men who reported all overtime hours were those who resisted the "pervasive effect" of the supervisors, instructions.

In the instant case, the court finds that supervisors were pressuring employees into falsifying their records rather than encouraging truthful reported of overtime hours. Under these circumstances, the court finds that the burden of proof shifted to the defendants, and it was their obligation to show which of the employees had reported all overtime hours. *See Brennan v. General Motors Acceptance Corp.*, 482 F.2d 825 (5th Cir. 1973).

C. Twenty-four Hour Pay Claims.

Section 785.23 of Title 29, Code of Federal Regulations, reads as follows:

> An employee who resides on his employer's premises on a permanent basis or for extended periods of time is not considered as working all the time he is on the premises. Ordinarily, he may engage in normal private pursuits and thus have enough time for eating, sleeping, entertaining, and other periods of complete freedom from all duties when he may leave the premises for purposes of his own.

Plaintiffs contend that 29 C.F.R. § 785.23 must be read in conjunction with 29 C.F.R. § 785.22. The court is not so persuaded. Section 785.22 reads:

> (a) *General.* Where an employee is required to be on duty for 24 hours or more, the employer and the employee may agree to exclude bonafide meal periods and a bonafide regularly scheduled sleeping period of not more than eight hours from hours worked, provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night's sleep. . . .
>
> (b) *Interruptions of sleep.* If the sleeping period is interrupted by call to duty, the interruption must be counted as hours worked. If the period is interrupted to such an extent that the employee cannot get a reasonable night's sleep, the entire period must be counted.

As set forth in the Findings of Fact above, Stuckey's did not require its employees to be on duty twenty-four hours a day. Further, record reveals that plaintiffs were able to pursue outside lives and engage in activities unrelated to work. These facts alone are enough to establish that under the FLSA the plaintiffs, sleeping time for each night during the period in question should be excluded from compensation. *See Rural Fire Protection v. Hepp,* 366 F.2d 355, 360 (9th Cir. 1966). Further, although the plaintiffs, testimony regarding interruptions during sleeping time also varies greatly, the record reveals that the delivery service, McLeans, which began delivering for Stuckey's sometime in 1982, rarely, if ever, made night

deliveries. Therefore, the court finds that, under the normal, usual circumstances, the plaintiffs slept uninterrupted despite occasional evening deliveries or calls. Accordingly, the plaintiffs, claim for compensation for twenty-four hours per day must fail.

D. Statute of Limitations.

The burden of proof is upon the defendants to prove that their failure to obey the FLSA was both in good faith and predicated on such reasonable grounds that it would be unfair to impose upon them more than a compensatory verdict. *See* 29 U.S.C. § 260; *Brock v. Shirk,* 833 F.2d 1326 (9th Cir. 1987), *vacated and remanded on other grounds,* 109 S. Ct. 38 (1988). They did not meet this burden.

Based on all the evidence, the court concludes that since the defendants either knew or showed reckless disregard for the matter of whether their conduct was prohibited by statute, the applicable statute of limitations is three years. *See* 29 U.S.C. § 255. *See also McLaughlin v. Richland Shoe Co.,* 108 Lab. Cas. (CCH) ¶ 35,067, 108 S.Ct. 1677 (1988); *Brennan v. General Motors Acceptance Corp.,* 482 F.2d 825, 829 (5th Cir. 1973).

E. Liability of Defendants

An employer includes any person acting directly or indirectly in the interest of an employer in relation to an employee. *See* 29 U.S.C. § 203(d). Under the Findings of Fact set out above, Pet, Incorporated is an "employer" and under the Fair Labor Standards Act along with

Stuckey's Inc., *See Hodson v. Servomation-Ajax Co., Inc.*, 323 F. Supp. 1047 (N.D. Miss. 1971).

F. Damages.

The court provides the following formula for calculating the amount of overtime due the plaintiffs herein. The hourly rate shall be determined by dividing the weekly rate by sixty (60) for managers and forty (40) for hourly employees to arrive at the hourly rate (in no event shall the hourly rate be less than minimum wage) of pay and then multiplying the hourly rate of pay by one and one-half to arrive at the overtime rate. *See* 29 C.F.R. § 778.113(a), (b). *See also Oliver v. Mercy Medical Center, Inc.*, 695 F.2d 379 (9th Cir. 1982). The court further finds that bonuses paid to "managers" must to totaled with other earnings to determine the regular rate on which overtime pay must be based. *See* 29 C.F.R. § 778.203. Fringe benefits such as paid vacations and paid holidays shall be excluded in calculating damages herein. Some spouses were paid for 44 hours, and credit will be given to defendants in those instances.

Defendants are liable to plaintiffs for reasonable attorney fees and costs of the action. *See* 29 U.S.C. § 216(b).

Counsel for both parties are ordered to meet within twenty (20) days and endeavor to reach accord as to the amount of the monetary judgment to which each particular plaintiff is entitled, and within ten (10) days thereafter, prepare an exhibit reflecting the same.

Likewise, counsel are to endeavor to agree on the issue of attorney fees, but if unable to do so, the court will set the matter for an evidentiary hearing at a later date.

The court shall retain jurisdiction to determine the amount of the final judgments to be entered herein in the event the parties are unable to agree on said amounts.

IT IS SO ORDERED this 17th day of July, 1989.

/s/ Donald E. O'Brien
Donald E. O'Brien,
Chief Judge
UNITED STATES
DISTRICT COURT

Copies mailed by regular mail on July 17, 1989 to:
PL Nymann; Steven C Kohl; PO Box 1825; Sioux City, Iowa 51102
Gene R LaSuer; Jean McNeil; 2300 Financial Center; Des Moines, Iowa 50309

/s/ J. Hoch
Deputy Clerk

APPENDIX H

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

SIDNEY MURRAY and GLADYS MURRAY, On Behalf of Themselves and All Others Similarly Situated,	*	
Plaintiffs,	*	CIVIL NO. 85-4085
vs.	*	
STUCKEY'S INC. and PET INCORPORATED,	*	
Defendants.	*	ORDER (Filed Jan. 8, 1990)

Plaintiffs' motions to alter or amend the court's order and to determine attorney fees bring this matter before the court. After considering the written and oral arguments, the court denies in part and grants in part the plaintiffs' motion to alter or amend. The court also determines that plaintiffs' counsel should be awarded $142,308.21 in attorney fees and expenses.

Wage Calculation

In addressing the issue of damages in this case this court said:

> The court provides the following formula for calculating the amount of overtime due the plaintiffs herein. The hourly rate shall be determined by dividing the weekly rate by sixty (60) for managers and forty (40) for hourly

> employees to arrive at the hourly rate (in no event shall the hourly rate be less than minimum wage) of pay and then multiplying the hourly rate of pay by one and one-half to arrive at the overtime rate. *See* 29 C.F.R. § 778.113(a), (b). *See also Oliver v Mercy Medical Center, Inc.*, 695 F2d 379 (9th Cir. 1982). The court further finds that bonuses paid to "managers" must be totaled with other earnings to determine the regular rate on which overtime pay must be based. *See* 29 C.F.R. § 778.203.

Murray v. Stuckey's, Inc., No. 85-4085, slip op at 34 (ND Iowa, July 17, 1989). The plaintiffs now ask that "forty (40)" be substituted for "sixty (60)" in the formula. Their main concern is that division by 60 instead of 40 will, in some cases, result in hourly wages below the minimum wage. This court finds that 60 was and still is the appropriate number for the calculation. For those cases in which division by 60 produces a wage below the minimum of $3.35 per hour, the wage shall be adjusted up to $3.35 per hour.

Bonuses per hour shall be determined by dividing the total year's bonus by 2000 (50 weeks/year x 40 hours/week). Bonuses per hour shall then be added to the wage rate calculated by using the formula set out above or $3.35 whichever is higher. The sum of bonuses per hour and the wage rate provides the hourly wage for use in determining overtime pay.

Managers shall receive one half of the hourly wage in overtime pay for each of the 20 hours from 40 to 60 that they worked each week. They shall receive one and one half times the hourly wage for each hour over 60 worked each week. The maximum hours per week to be allowed

in figuring overtime for managers is 70 for each week from October 1 to May 1 and 77 for each week from May 1 to October 1.

All other employees shall receive one and one half times the hourly wage for each hour over 40 per week for which they were not paid. Those spouses who were paid for 44 hours per week shall receive time and a half for each hour over 44. The maximum hours per week to be allowed in figuring overtime for non-manager spouses is 60 for each week from October 1 to May 1 and 66 for each week from May 1 to October 1. The maximum hours per week to be allowed in figuring overtime for non-manager, non-spouses is 60 for each week from October 1 to May 1 and 60 for each week from May 1 to October 1.

The court notes here, as it did in its earlier order, that the applicable statute of limitations in this case is three years, not two. See *Murray v Stuckey's, Inc.*, No. 85-4085, slip op. at p 33 (ND Iowa, July 17, 1989).

Liquidated Damages

The plaintiffs ask that the court expressly find that they are entitled to liquidated damages. Employers who violate the Fair Labor Standards Act's (FLSA) overtime compensation provisions are liable to employees for the unpaid overtime compensation and for liquidated damages in an equal amount. 29 USC § 216(b). Nevertheless, the court may refuse to award liquidated damages "If the employer shows to the satisfaction of the court that the act or omission . . . was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act . . . "

29 USC § 260. This court noted in its earlier order that the "burden of proof is upon the defendants to prove that their failure to obey the FLSA was both in good faith and predicated on such reasonable grounds that it would be unfair to impose upon them more than a compensatory verdict. . . . They did not meet this burden." *Murray*, slip op. at p 33. The defendants are therefore liable to the plaintiffs for liquidated damages under 29 USC § 216(b) in an amount equal to the back pay liability.

Attorney Fees

Section 16(b) of the Fair Labor Standards Act, 29 USC 216(b), provides that "[t]he court . . . shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant . . . " In presenting their view of a reasonable fee, plaintiffs' counsel rely heavily on their contingency contract with their clients. "The existence of a contingency contract may be considered by a district court as an element to be considered in determining the market value of an attorney's services, but the court is not bound in any sense by that agreement." *United Slate, Tile and Composition Roofers v G & M Roofing and Sheet Metal Company, Inc.*, 732 F2d 495, 504 (6th Cir 1984). The fee award in this case takes the place of the one-third portion that plaintiffs' counsel were to receive under their contingency agreement: plaintiffs' counsel can now recover nothing from their clients under that agreement.

In determining a reasonable fee, this court started with the number of hours plaintiffs' counsel spent on this case and multiplied it by a reasonable hourly rate. See

Hensley v Eckerhart, 461 US 424, 433 (1983).[1] Plaintiffs' counsel filed their time sheets for this case. The court finds that Mr. Nymann spent a total of 1073.5 hours on the case. Mr. Kohl worked 337.4 hours. The *Hensley* court held that the "party seeking an award of fees should submit evidence supporting the hours worked and rates claimed." *Hensley*, 461 US at 433. Plaintiffs' counsel did not provide with their listing of time spent any indication of their normal hourly rates. Nevertheless, during the hearing on this matter, Mr. Kohl testified that his rate for cases of this type is $70 to $75 per hour. He said Mr. Nymann's rate is $75 to $80 per hour. The court finds $70 to be a reasonable hourly rate for Mr. Kohl[2] $80 is a reasonable hourly rate for Mr. Nymann. Based on these figures, the court estimates the value of Mr. Kohl's services as $23,618 and Mr. Nymann's as $85,880.

The calculation, however, does not end with these estimates. "The district court also should exclude from this initial fee calculation hours that were not 'reasonably expended.' " *Hensley*, 461 US at 434. The defendants have objected that plaintiffs' counsel have requested payment for time spent on trips to the courthouse to file documents – trips that did not require a lawyer's services. The court is persuaded that under *Hensley* it must disallow these items. Mr. Kohl made 33 such trips; Mr. Nymann

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[1] Though *Hensley* was a civil rights case, the court noted that its standards for determining a reasonable attorney fee "are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party.' " *Hensley*, 461 US at 433, n 7.

[2] Mr. Kohl testified that early on in this case his hourly fee was less.

made seven. They generally allotted .3 hours for each of these trips. Accordingly, Mr. Kohl's fee is reduced by $693, Mr. Nymann's by $168.

In addition, defendants point out that Mr. and Mrs. Kajander's claim for medical benefits does not fall under the Fair Labor Standards Act's provisions for award of attorney's fees. Any time spent on these claims should be deducted from the fee award. Mr. Kohl allots .6 hours to the Kajanders' claim, and Mr. Nymann allots 9.9 hours. Therefore, Mr. Kohl's fee is reduced by $42 and Mr. Nymann's by $792.

After the hearing to determine attorney fees in this case, plaintiffs' counsel filed time sheets setting out an additional 24.3 hours which appear to have been spent mainly in pursuing this fee application. A court may award fees for services performed in litigating an attorney fee claim. *Jones v. MacMillan Bloedel Containers, Inc.*, 685 F2d 236, 239 (8th Cir 1982). Therefore, Mr. Nymann's fee set out above should be increased by $872 for the 10.9 hours set out in the supplemental fee claim. Mr. Kohl's fee is increased by $938 for his additional 13.4 hours.

With these additions and deductions, Mr. Kohl's fee comes to $23,821 and Mr. Nymann's fee is $85,792. The *Hensley* court noted that other factors may warrant an additional upward or downard [sic] adjustment of the fee. *Hensley*, 461 US at 434. In *Blum v. Stenson*, 465 US 886, 897 (1984), the court repeated its view that the product of the claimed rate and reasonable hours is presumed to be the reasonable fee but rejected the argument that an upward adjustment is never permissible. The court, however, did not address whether the risk of not being the

prevailing party, and therefore not being entitled to an award of attorney's fees, may justify an upward fee adjustment. See *Id.* at 901, n 17. Included within the risk factor of not prevailing, especially in lengthy litigation, is a delay in payment factor. Justice Brennan, in his concurrence, addressed these issues and concluded that "upward adjustments to compensate for the contingent nature of success, and thus for the risk of nonpayment in a particular case" are appropriate and consistent with the court's ruling. *Blum,* 465 US at 903. This court finds that the record in this case supports an upward adjustment of 15% for the contingency risk of not prevailing and for the delay in payment factor. With this upward adjustment, Mr. Kohl's fee becomes $27,394 and Mr. Nymann's fee becomes $98,661.

Finally, plaintiffs' counsel have set out $16,253.21 in itemized expenses. Of this amount, $4553.65 is attributable to expert witness fees for two attorneys who testified at the hearing on attorney fees. Plaintiffs' counsel attempted to demonstrate through this expert testimony that the appropriate hourly rate for this case, based on contingency fee rates, should be anywhere from $250 per hour to $2500 per hour. On this basis, one of the experts estimated that a fair and reasonable attorney fee for this case would be $900,000. This court is not persuaded that it should accept the calculations offered by the expert witnesses, but it does find that it was appropriate to present such evidence, and the amounts paid for such services were reasonable under the circumstances. Thus, the plaintiffs' counsel should receive $16,253.21 for their itemized expenses.

Conclusion

Accordingly, IT IS ORDERED:

1. Plaintiffs' request that the formula for figuring managers' hourly rate be amended is denied.

2. Plaintiffs' request for an express finding that they are entitled to liquidated damages in an amount equal to the backpay liability under 29 USC § 216(b) is granted.

3. Plaintiffs' counsel are awarded $142,308.21 for their services and expenses: $27,394 for Mr. Kohl's services; $98,661 for Nymann's services; and $16,253.21 in expenses.

January 5, 1990.

/s/ Donald E. O'Brien
Donald E. O'Brien, Judge
UNITED STATES
DISTRICT COURT

Copies mailed by regular mail w/Judgment January 8, 1989 to:

P.L. Nymann; Steven Kohl; PO Box 1825; Sioux City, IA 51102

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John Renick; 2730 North Ballas Road; Suite 200 St Louis, MO 63121

/s/ J Hoch
Deputy Clerk

APPENDIX I

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

SIDNEY MURRAY and GLADYS MURRAY, On Behalf of Themselves and All Others Similarly Situated,	*	Civil No. 85-4085
Plaintiffs,	*	Order
vs.	*	
STUCKEY'S INC. and PET INCORPORATED,	*	(Filed Jul. 16, 1990)
Defendants.	*	

Several posttrial motions bring this matter before the court: (1) defendants' resisted motion to amend findings of fact and conclusions of law or for new trial; (2) plaintiff's motions to strike the defendants' replies to the plaintiffs' damage calculations; (3) plaintiffs' resisted damage calculations for plaintiffs who were paid by the hour; (4) plaintiffs' resisted damage calculations for plaintiffs who were paid a weekly salary; and (5) defendants' resisted motion to stay execution for seven days following the court's ruling on these posttrial motions. After considering the arguments on these motions, the court denies the motion to amend in part and grants it in part, denies the motion to strike defendants' replies, sets out the amount to be awarded each plaintiff, and grants the motion for stay of execution. The court also orders the

parties to file briefs on the issue of a possible enhancement of attorney fees.

I. Defendants' Motion to Amend Findings of Fact and Conclusions of Law or for New Trial

The defendants' motion and oral arguments on the motion raised three principal issues.

A. Executive Exemption

The defendants contend that the court erred in finding that the manager plaintiffs' primary duties were not management. Instead, according to the defendants, these plaintiffs were responsible for isolated stores, they hired and fired employees, they received bonuses, and performed other functions indicative of management responsibilities. On that basis, the defendants argue that these plaintiffs fall within the Fair Labor Standards Act's (FLSA) executive exemption. 29 USC § 213(a)(1).

The defendants cite *Tippie v Affordable Inns*, 24 WH Cases (BNA) 975 (W D Okla 1980), to support their argument that these plaintiffs are exempt from the FLSA. *Tippie* involved husband-and-wife teams hired to manage motels and perform some of the same functions as the plaintiffs here. The court's opinion in *Tippie*, however, mentions no regional manager structure comparable to that employed by Stuckey's. As this court pointed out in its memorandum opinion and order:

> The court is persuaded that Stuckey's regional managers served as the "real managers" of their stores. The evidence demonstrates that regional

> managers were the individuals who made the vast majority of the "significant decisions" concerning Stuckey's operations. For example, the regional managers decided the number of employees needed at a particular store; whether overtime hours were necessary (the evidence showed that if overtime was turned in by a particular store manager, the regional manager would reprimand [the store] manager); store hours; gasoline prices; from where to order various supplies; . . . For support of this, see Exhibits A-7, A-19, A-21, I, N, and Q.

Murray, et al. v Stuckey's et al., Memorandum of Law, p 27-28 (N D Iowa, July 17, 1989).

Exemptions to the FLSA are to be narrowly construed, and the defendants bear the burden of establishing exemptions affirmatively and clearly. *Brock v Norman's Country Market, Inc.*, 835 F2d 823, 826 (11th Cir 1988); *Donovan v Williams Chemical Co., Inc.*, 682 F2d 185, 191 (8th Cir 1982). The defendants have not carried that burden; their motion on this issue is denied.

B. Number of Hours Worked

The defendants argue that the plaintiffs have not carried their burden of proof regarding the number of hours worked. This court pointed out in its memorandum opinion, however, that "supervisors were pressuring employees into falsifying their records rather than encouraging truthful report[ing] of overtime hours." *Murray*, Memorandum of Law, p 31. The burden of proof regarding the number of hours worked had shifted to the defendants; they were obliged to show which of the

employees had reported all overtime hours. See *Brennan v General Motors Acceptance Corp.*, 482 F2d 825 (5th Cir 1973). The defendants did not carry that burden, and their motion to amend on this issue is denied.

C. Attorney Fees and Expenses

The defendants ask that the court amend its award of attorney fees and expenses. This court awarded $126,055 in attorney fees and $16,253.21 in expenses to the plaintiffs. The defendants now argue that $20,000 should be deducted from the attorney fee award as a credit for attorney fees previously paid to the plaintiffs' attorneys for services to plaintiffs who settled their claims before trial. This previous payment had not been mentioned by either party prior to the order on fees. The defendants note that the plaintiffs' attorneys, in submitting their time records for their fee claim, did not reduce their hours for services provided to the plaintiffs who settled. Without the $20,000 reduction, say the defendants, the plaintiffs' attorneys would be paid twice for some hours.

In resisting the reduction in their fee, the plaintiffs' attorneys have filed a summary of the settlement agreement. That agreement allotted $19,737.50 to attorney fees. Plaintiffs' attornies [sic] have no persuasive argument for not counting the earlier payment. To avoid the double payment of fees of which the defendants complain, the court deems it appropriate to amend the fee award by deducting $19,737.50.

Until the parties submitted the damage calculations in this case, the court had not been fully alerted to the

extent of the plaintiffs' success and recovery. In light of the nearly $950,000 award of damages set out in this order, the court deems it appropriate to revisit one aspect of the attorney fee claim – the possibility of a fee enhancement due to the plaintiffs' exceptional success in this case. See, for example, *Richardson v Restaurant Marketing Associates, Inc.*, 527 F Supp 690, 702 (ND Cal 1981). The court is considering an enhancement of $50,000 in the attorney fee award. Though the parties have made several filings on the attorney fees issue, none appears to directly address this issue of the possibility of a fee enhancement for exceptional success. The court therefore requests that the parties file their views on this matter in compliance with the schedule set out below.

The court also awarded $16,253.21 in expenses to the plaintiffs. According to the defendants, $2,694.75 of the expenses claimed by the plaintiffs were for the plaintiffs' own travel, motel, and meal expenses and for loss of work. The defendants argue that the plaintiffs were, in effect, paying themselves to attend the trial of this matter. The court deems it appropriate to reduce the award of expenses by the requested $2,694.75. The plaintiffs should receive $13,558.46 for their expenses.

D. Summary

The defendants' motion to amend is granted to the extent that the attorney fee award shall be reduced by $19,737.50 and the expenses award shall be reduced by $2,694.75. The defendants' motion to amend and supplement findings of fact and conclusions of law or motion for new trial is in all other respects denied.

II. Plaintiffs' Motions to Strike the Defendants' Replies to Plaintiffs' Damage Calculations

The plaintiffs ask that the court strike the defendants' replies to the damage calculations because those replies were not filed on time. Because the defendants had contacted the court, however, and explained that their replies would be delayed, the motions to strike are denied.

III. Damage Calculations for Plaintiffs Who Were Paid by the Hour

The plaintiffs have filed damage calculations for plaintiffs who were paid by the hour. The defendants have responded to those calculations. The defendants agree that the following plaintiffs should be paid the following total amounts including liquidated damages:

Veralyn Blair	$26,714.40
Bettye Bryant	18,870.60
Joni Bushnell	9,178.96
Linda Brown	14,296,80
Christine Christiansen	9,759.12
Kenneth Crist	22,004.64
Anna Foster	5,863.76
Adrienne Geisenheimer	8,370.88
Michael Hamilton	7,323.68
Roger Hoyt	19,524.96
Sharon Jacoby	19,684.00
James Lewis	16,895.44
Rita Miller	7,707,84
Carol Renecker	34,535.70
Bonnie Stotts	14,027.44
Joyce Tompkins	25,361.68

The defendants contest the plaintiffs' damage calculations for Gladys Murray and Lois Phillips. According to the plaintiffs, Murray should receive $15,859.44 as an hourly employee in addition to the award she seeks as a salaried employee. The defendants reply that Gladys Murray should receive no compensation beyond that awarded as a manager. But the plaintiffs point out that Gladys Murray worked while she was on disability.

The court noted this in its memorandum opinion: " . . . Mrs. Murray testified that 'the regional manager for Stuckey's still called for me [while she was on disability]. I performed the daily reports. I ordered. I did the paperwork in the hospital. I complained [of the situation]. They [Stuckey's] told me to get the job done or they would get someone else.' " *Murray*, Memorandum of Law, p 6. In light of the court's findings of fact, the court deems it appropriate to award Mrs. Murray the requested $15,859.44 in hourly wages in addition to the amount she should receive for her managerial duties.

As for Lois Phillips, the defendants argue that she should receive $22,107.60, not the $48,079.60 set out in the plaintiffs' damage calculations. The plaintiffs argue that Mrs. Phillips should be paid for each of the hours she worked: the hours up to 40 each week as well as the overtime hours. The plaintiffs point to the testimony of Mrs. Phillips's husband, Donald, to support their argument that Mrs. Phillips worked off the clock and was paid for none of the hours she worked. The defendants assert that she should be paid for her overtime hours but not for the non-overtime hours up to 40 that she worked each week. The court is persuaded that Ms. Phillips should be

paid for all the hours that she worked, not just the overtime hours. She should receive $48,079.60.

IV. Damage Calculations for Plaintiffs Paid a Weekly Salary

The plaintiffs have filed damage calculations for 28 plaintiffs who were paid a salary. The defendants have contested those calculations. They claim that the plaintiffs erred in several ways: (1) the plaintiffs divided the bonuses paid by 2,000 hours instead of 3,000; (2) they included bonuses for four years instead of one; and (3) they included vacation pay in their calculations. The plaintiffs have conceded that they failed to deduct two weeks of vacation pay per year from their damage calculations and that the calculations should be reduced by 4% (approximately 2/52).

The court holds, as it did in its previous order addressing this issue, that 2,000 hours is the correct divisor for calculations of the bonus wage. *Murray, et al. v Stuckey's et al.*, p 2 (N D Iowa, January 8, 1990). The court therefore rejects the defendants' suggestion that bonuses should have been divided by 3,000 hours.

The plaintiffs also contend that damage calculations should be based on bonuses paid in 1982, 1983, 1984, and 1985. Nevertheless, in its findings of fact, this court acknowledged that bonuses had been paid in 1983. *Murray, et al. v Stuckey's et al.*, Memorandum of Law, p 10 (N D Iowa, July 17, 1989). The findings of fact do not mention bonuses paid for 1982, 1984, or 1985. The damage calculations should not be based on bonuses for those three years.

In determining the damages to be awarded the salaried employees, the court has accepted the defendants' calculations for the plaintiffs who received bonuses. The court also used the calculations which divided the bonus amounts by 2,000 hours instead of 3,000 hours. For the remaining salaried employees the court deducted 4% from the plaintiffs' calculations to account for the vacation pay which should not have been included in the calculations. On that basis, the following plaintiffs should be paid the following total amounts including liquidated damages:

Harley Blair	$27,062.62
Larry Brown	12,196.80
Kinney Bryant	21,345.41
Randy Bushnell	9,774.30
Floyd Caskey	7,229.38
Allan Christiansen	8,255.76
Bobbie Cockrell	8,711.37
Mary T. Cope	26,816.20
Sandra Crist	18,728.64
Stanley Dixon	37,358.82
Thomas Foster	4,774.56
Edward Geisenheimer	6,948.48
Rae Jean Hamilton	6,025.50
Deborah L. Hoyt	21,426.94
Loren Jacoby	18,429.90
Warren Kajander	8,459.46
Carol Lewis	16,675.96
Thomas Miller	8,932.56
Gladys Murray	32,283.16
Jeanette (Petrimoulx) Arbuckle	38,452.02
Donald Phillips	20,700.36
Joy M. Powers	35,796.08
Russell Renecker	53,048.00
Eugene Rutledge	47,339.00

Donald Scott	12,546.68
Arthur Stotts	16,291.20
Lawrence Taylor	24,601.94
David Tompkins	29,821.00

V. Defendants' Resisted Motion to Stay Execution for Seven Days

The defendants ask that the court stay execution of the judgment against them for seven days after the date of this order. The defendants assert that it will take approximately one week for them to secure an appropriate supersedeas bond if they decide to appeal this ruling, and they will be prejudiced if the plaintiffs are permitted to execute before the defendants can post the bond. In light of the court's request for additional briefing on the attorney fee issue, the court grants a stay of execution until seven days after the court enters an order on the attorney fee issue.

VI. Conclusion

Accordingly, IT IS ORDERED:

1. The fee award for the plaintiffs' attorneys shall be reduced by $19,737.50. Within 10 days of the date of this order, the plaintiffs' attorney shall file a brief on whether an enhancement of the attorney fee award for exceptional success would be appropriate. Within 10 days of the plaintiffs' attorney's filing, the defendants shall file a brief in response.

2. The award for expenses to the plaintiffs' attorneys shall be reduced by $2,694.75. The attorneys shall

receive $13,558.46 instead of the $16,253.21 originally awarded.

3. The defendants' motion to amend and supplement findings of fact and conclusions of law or motion for new trial is in all other respects denied.

4. The plaintiffs' motion to strike the defendants' replies to damage calculations is denied.

5. The plaintiffs shall receive the following amounts in damages including liquidated damages:

Harley Blair	$27,062.62
Veralyn Blair	26,714.40
Larry Brown	12,196.80
Linda Brown	14,296.80
Bettye Bryant	18,870.60
Kinney Bryant	21,345.41
Joni Bushnell	9,178.96
Randy Bushnell	9,774.30
Floyd Caskey	7,229.38
Allan Christiansen	8,255.76
Christine Christiansen	9,759.12
Bobbie Cockrell	8,711.37
Mary T. Cope	26,813.20
Kenneth Crist	22,004.64
Sandra Crist	18,728.64
Stanley Dixon	37,358.82
Anna Foster	5,863.76
Thomas Foster	4,774.56
Adrienne Geisenheimer	8,370.88
Edward Geisenheimer	6,948.48
Michael Hamilton	7,323.68
Rae Jean Hamilton	6,025.50
Deborah L. Hoyt	21,426.94
Roger Hoyt	19,524.96
Loren Jacoby	18,429.90

Sharon Jacoby	19,684.00
Warren Kajander	8,459.46
Carol Lewis	16,675.96
James Lewis	16,895.44
Rita Miller	7,707.84
Thomas Miller	8,932.56
Gladys Murray	48,142.60
Jeanette (Petrimoulx) Arbuckle	38,452.02
Donald Phillips	20,770.36
Lois Phillips	48,079.60
Joy M. Powers	35,796.08
Carol Renecker	34,535.70
Russell Renecker	53,048.00
Eugene Rutledge	47,339.00
Donald Scott	12,546.68
Arthur Stotts	16,291.20
Bonnie Stotts	14,027.44
Lawrence Taylor	24,601.94
David Tompkins	29,821.00
Joyce Tompkins	25,361.68

6. The defendants' motion for stay of execution is granted. Execution shall be stayed until seven days after the court enters an order on the attorney fee issue on which it has asked the parties to file briefs.

July 14, 1990.

/s/ Donald E. O'Brien
Donald E. O'Brien, Chief Judge
UNITED STATES DISTRICT COURT

Copies mailed by regular mail July 16, 1990 to:

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John Renick; 2730 North Ballas Road; Suite 200; St. Louis, MO 63131

/s/ J Hoch
Deputy Clerk

APPENDIX J

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

SIDNEY MURRAY and GLADYS MURRAY, On Behalf of Themselves and All Others Similarly Situated,	*	Civil No. 85-4085
Plaintiffs,	*	Order
vs.	*	(Filed Oct. 31, 1990)
STUCKEY'S INC. and PET INCORPORATED,	*	
Defendants.	*	

In its order on posttrial motions in this case, this court noted:

> Until the parties submitted the damage calculations in this case, the court had not been fully alerted to the extent of the plaintiffs' success and recovery. In light of the nearly $950,000 award of damages set out in this order, the court deems it appropriate to revisit one aspect of the attorney fee claim – the possibility of a fee enhancement due to the plaintiffs' exceptional success in this case. See, for example, *Richardson v Restaurant Marketing Associates, Inc.*, 527 F Supp 690, 702 (ND Cal 1981). The court is considering an enhancement of $50,000 in the attorney fee award. Though the parties have made several filings on the attorney fees issue, none appears to directly address this issue of the possibility of a fee enhancement for exceptional

> success. The court therefore requests that the parties file their views on this matter . . .

Murray v Stuckey's, 85-4085, slip op at 4 (ND Iowa, July 16, 1990). The parties have filed briefs on the issue of a possible enhancement. After considering the arguments, the court determines that a further enhancement of the fee award would be inappropriate. The court concludes, however, that its order of January 5 must be modified to permit the plaintiffs' attorneys to recover part of the fee due under the contingent fee agreement with their clients.

In *Blum v Stenson,* 465 US 886, 891 (1984) the district court had awarded the attorney for the plaintiff class a 50% enhancement in fees due to "the quality of representation, the complexity of the issues, the riskiness of success, and the 'great benefit to a large class' that was achieved." The Supreme Court, however, reversed the award of an enhanced fee. The court noted that "because acknowledgement of the 'results obtained' generally will be subsumed within other factors used to calculate a reasonable fee, it normally should not provide an independent basis for increasing the fee award." *Id.* at 900.

In *Pennsylvania v Delaware Valley Citizens' Council for Clean Air,* 478 US 546, 565 (1986), the Supreme Court reaffirmed the view it had expressed in *Stenson:* complexity of issues, skill of counsel, quality of representation, and results obtained generally cannot serve as independent bases for increasing the basic fee award. Moreover,

> [a]lthough upward adjustments of the lodestar figure are still permissible, [citation omitted], such modifications are proper only in certain 'rare' and 'exceptional' cases, supported by both

> 'specific evidence' on the record and detailed findings by the lower courts. . . . In short, the lodestar figure includes most, if not all, of the relevant factors constituting a 'reasonable' attorney's fee, and it is unnecessary to enhance the fee for superior performance in order to serve the statutory purpose of enabling plaintiffs to secure legal assistance.

Id., at 565, 566. See also *McGee v Hester*, 815 F2d 1193, 1198 (8th Cir 1987) (record did not reflect exceptional success meriting enhanced attorney fee award); *Easley v Anheuser-Busch, Inc.*, 758 F2d 251, 264 (8th Cir 1985) (factors including results obtained on behalf of plaintiffs in employment discrimination case not sufficient to warrant enhancement of fee).

This court granted the plaintiffs' attorneys a 15% upward adjustment in the fee award because of the plaintiff's contingency risk of not prevailing and because of a delay in payment factor due to the lengthy nature of this litigation. *Murray v Stuckey's*, 85-4085, slip op at 8 (ND Iowa, January 5, 1990). This court had preliminarily considered the holding in *Richardson v Restaurant Marketing Associates, Inc.*, 527 F Supp 690, 702 (ND Cal 1981), a potential basis for an enhancement of the fee award here. But in light of the authority cited to the court by the parties – *Stenson* and *Delaware Valley* – as well as *McGee* and *Easley*, this court cannot conclude that this case is of the "rare" or "exceptional" sort warranting a further enhancement of the attorney fee award because of the results obtained.

Nevertheless, the court deems it appropriate to modify its order regarding the enforceability of the plaintiffs'

attorneys contingent fee agreement with their clients. In its order of January 5, this court said:

> The fee award in this case takes the place of the one-third portion that plaintiff's counsel were to receive under their contingency agreement: plaintiffs' counsel can now recover nothing from their clients under that agreement.

Murray v. Stuckey's, 85-4085, slip op at 5 (ND Iowa, January 5, 1990). The court was concerned that plaintiffs' attorneys might receive a double recovery if they were awarded statutory attorney fees and allowed to recover on the contingent fee contract. The plaintiffs, however, have now alerted the court to the Eighth Circuit Court of Appeals's decision in *Wilmington v J.I. Case Co.*, 793 F2d 909, 923 (8th Cir 1986). In *Wilmington*, the court held that the award of fees need not "circumscribe the amount attorneys may recover by limiting compensation to the statutory award regardless of other arrangements with the client. [Citations omitted]. . . . We also are inclined to agree . . . that normally the plaintiff should be responsible for the difference between the statutory award and the contingent fee amount." *Id.* This court therefore deems it appropriate to modify its earlier order on attorney fees to comply with the court of appeals's example in *Wilmington:* the plaintiffs' attorneys shall be permitted to recover fees from their clients under the contingent fee agreement, but the statutory fee award shall be applied toward the amount due the plaintiffs' attorneys under the contingent fee agreement, not in addition to the amount due under that agreement.

Accordingly, IT IS ORDERED, the court's January 5 order on attorney fees shall be modified as follows:

1. The first full sentence on page five shall be deleted.

2. The following sentences shall replace it: "The plaintiffs' attorneys shall be permitted to recover fees from their clients under the contingent fee agreement, but the statutory fee award shall be applied toward the amount due the plaintiffs' attorneys under the contingent fee agreement, not in addition to the amount due under that agreement. See *Wilmington v. J.I. Case Co.*, 793 F2d 909, 923 (8th Cir 1986)."

3. The statutory fee award to the plaintiffs' attorneys shall be $106,317.50.

October 31, 1990.

/s/ Donald E. O'Brien
Donald E. O'Brien,
Chief Judge
United States
District Court

Copies mailed by regular mail October 31, 1990 to:

P.L. Nymann; Steven Kohl; PO Box 1825; Sioux City, IA 51101

Gene LaSuer; Jean MNeil [sic]; 2300 Financial Center; Des Moines, IA 50309

John Renick; 2730 North Ballas Road; Suite 200; St Louis, MO 63131

Two (2) Certified copies to 8th Circuit in St Louis, MO

/s/ J. Hoch
Deputy Clerk

APPENDIX K

Federal Rule of Civil Procedure 52(a)

Rule 52. Findings by the Court.

(a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

* * *

APPENDIX L

Section 16 FLSA

[Wage Suits by Employees]

(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 15(a)(3) of this Act shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 15(a)(3), including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under

section 17 in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 6 or section 7 of this Act by an employer liable therefore under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 15(a)(3).

APPENDIX M

Section 13 FLSA

Sec. 13. (a) The provisions of sections 6 (except section 6(d) in the case of paragraph (1) of this subsection) and 7 shall not apply with respect to–

[Executive, Administrative, Professional Employees, and Outside Salesmen]

(1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools) or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the Administrative Procedure Act, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities); or

* * *

OVERSIZE FOLDOUT(S) FOUND HERE IN THE PRINTED EDITION OF THIS VOLUME ARE FOUND FOLLOWING THE LAST PAGE OF TEXT IN THIS MICROFICHE EDITION.

SEE FOLDOUT NO 1

APPENDIX N

EXHIBIT "B"

#287 - Little Sioux, Iowa

WEEK ENDING	SALES	LABOR ALLOWANCE		LABOR USED
8-10-85	2020	470 (CLOSING)		470
8/3	8928	639	"	639
7/27	4830	600		605
7/20	6088	600	(TRAINING)	652
7/13	6048	600		602
7/6	6794	579		579
6/29	5491	525		525
6/22	5258	500		478
6/15	4059	432		431
6/8	3959	365		365
6/1	3736	365		365
5/25	3100	344		344
5/18	2503	344		344
5/11	2749	344		374
5/4	2290	344		334
4/27	2181	344		337
4/20	2624	344		361
4/13	2892	371		345
4/6	2716	371		396
3/30	2813	344		345
3/23	2063	344		340
3/16	2054	344		342
3/9	1948	344		358
3/2	1712	344		344
2/23	2142	364		352
2/16	1668	344		344
2/9	1762	478		478
2/2	1540	478		478
1/26	1674	478		478
1/19	1624	478		478

WEEK ENDING	SALES	ALLOW		USED
1/12	2211	478		451
1/5	2865	478		478
12/29/84	2746	506	(VAC 28)	509
12/22	3007	505		505
12/15	1524	479		478
12/8	2245	898	(VAC 420)	898
[illegible] 12/1	3135	485		435
11/24	3509	498		485
11/17	2846	754	(VAC 276)	745
11/10	3032	445		432
11/3	3192	425		422
10/27	3728	425		418
10/20	3935	425		419
10/13	3680	425		418
10/6	4588	566		561
9/29	4328	583		583
9/22	4983	1316	(VAC 696)	1276
9/15	5391	659	(TRN 39)	620
9/8	7167	633		606
9/1	7145	667		619
8/25	7848	667		646
8/18	9346	727		663
8/11	9265	727		645
8/4	9918	774		632
7/28	9318	774		770
7/21	9959	774		724
7/14	10643	774		774
7/7	10946	774		774
6/30	11009	774		758
6/23	10282	774		745
6/16	9845	774		727
6/9	9691	714		681

WEEK ENDING	SALES	ALLOW		USED
6/2	10481	787		763
5/26	8422	714		707
5/19	7218	714		714
5/12	6172	714		712
5/5	6058	714		676
4/28	7023	714		584
4/21	6389	680		565
4/14	5992	549		535
4/7	6361	586	(TRN 47)	568
3/31	6105	586		524
3/24	5231	549		568
3/17/84	5699	549		551

EFF 6-9-85 REST 7A-5P AND 2HRS
EFF 6-2-85 " " 7 DAYS/STORE SAME
EFF 8-5-84 7A-7PM STORE HOURS
EFF 9-4-84 7A-6PM " "
EFF 10-7-84 REST 8AM-2PM / STORE 7A-5PM
" 11-7-84 REST F-S-S-M 7A/5PM T-W-T 8A/2PM
" 2-10-85 STORE 7A/5P CLOSED WED 1/15/9-5 M-T-T 9-5 F-S 10-5

(2)

No. 95-38

Supreme Court, U.S.
FILED
AUG 07 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

GLADYS MURRAY, On Behalf of Herself and All Others Similarly Situated (and 27 Other Individuals),

Petitioners,

v.

STUCKEYS, INC., and PET INCORPORATED,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals appropriately determined that the District Court erred in applying the law defining the executive exemption under the Fair Labor Standards Act to the facts of this case?

2. Whether it is appropriate for this Court to grant review of a decision which is not contrary to prior decisions of this Court, the Eighth Circuit or the other Circuits and which simply holds that the District Court misapplied the law to the facts of this case?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

STATEMENT OF THE CASE

Petitioners are former managers of retail convenience stores owned and operated by Stuckey's, Inc. At all times pertinent to Petitioners' claims, Stuckey's Inc. was a wholly owned subsidiary of Pet, Incorporated. During the course of this litigation, Pet was a subsidiary of IC Industries which was later renamed Whitman Corporation. At the time of the appeal to the Eighth Circuit Pet was not affiliated with any other corporation.

The managers filed suit claiming overtime pay and liquidated damages under the Fair Labor Standards Act (FLSA) 29 U.S.C. §§ 201 et seq. In support of their claim, the managers alleged that they worked twenty-four (24) hours a day throughout their period of employment.

The Respondents claimed that the managers were exempt from the recordkeeping, minimum wage, and overtime pay requirements of the FLSA, pursuant to § 213(a)(1), because they were executive employees as defined by the regulations of the Secretary of Labor. Under this regulation, employees must meet the requirements of a six part test to qualify as exempt employees. 29 C.F.R. § 541.1.

The matter was originally tried in the United States District Court for the Northern District of Iowa where judgment was entered for the managers. The District Court awarded back wages and liquidated damages to each manager, although not on the basis of twenty-four (24) hours worked per day. A subsequent Order was

entered awarding attorneys' fees. Respondents appealed to the United States Court of Appeals for the Eighth Circuit. After hearing oral argument, a three-judge panel unanimously reversed the District Court's decision on the back wages and damage awards to the managers and vacated the award of attorneys' fees. The Court of Appeals remanded the case to the District Court for further findings because the District Court had not made complete findings of fact and conclusions of law on all elements of the executive exemption. Specifically, the Court of Appeals remanded the case to the District Court to consider whether the managers regularly and customarily supervised two or more employees, whether the managers regularly and customarily exercised discretionary authority and whether the managers had authority to hire and fire employees.

A Petition for Rehearing and Suggestion for Rehearing En Banc filed by the Petitioners was subsequently denied. Likewise the Petitioners' Petition for Writ of Certiorari was also denied by the United States Supreme Court on January 27, 1992.

On remand, the matter was submitted to the District Court on the evidence originally offered by the parties with no further evidence offered by either party. This evidence consisted primarily of documentary evidence and witness testimony offered by way of depositions. The District Court only addressed two of three issues on remand since Petitioners stipulated the managers had authority to hire and fire employees. Despite overwhelming evidence to the contrary, the District Court resolved these two remaining issues in favor of the Petitioners and entered judgment against the Respondents.

The Respondents appealed the District Court's decision and the United States Court of Appeals again reversed the District Court and directed that the Petitioners' action be dismissed. A Petition for Rehearing and Suggestion for Rehearing En Banc filed by the managers were subsequently denied by Order of the Eighth Circuit dated April 29, 1995. Respondents' counsel on appeal received copies of the Petition for Writ of Certiorari on July 10, 1995.

SUMMARY OF ARGUMENT

No legitimate reasons are set forth in the Petition for review of the rulings by the Eighth Circuit Court of Appeals. Petitioners' contentions that the Eighth Circuit's decision conflicts with applicable decisions of this Court and that it conflicts with recent decisions of three other Circuit Courts of Appeals are without support. These contentions stem from Petitioners' inability to recognize and differentiate questions of fact and questions of law as well as from Petitioners' misinterpretation of the Eighth Circuit's rulings. Contrary to Petitioners' statements, The Eighth Circuit did not make factual findings on their own nor did it substitute its judgment of the facts for those of the District Court, without regard to the "clearly erroneous" standard of review of FRCP 52(a).

Instead, the Court of Appeals held that the District Court erred in applying the law, in the form of the Secretary's regulations and interpretations, to the undisputed facts of record. As a result, the Eighth Circuit

reached different conclusions in determining whether Respondent's proof was sufficient to establish that Plaintiff Managers satisfied all elements of the executive exemption test. To the extent the District Court's "findings of fact" were predicated on its erroneous interpretations of the applicable law, the "clearly erroneous" standard was not controlling. Nonetheless to the extent the Court found facts to the contrary, it is plainly evident from the opinion that the panel adjudged the District Court's rulings on these issues to be clear error. In so holding, it is equally evident that the Court of Appeals was mindful of the long-standing precedent under the FLSA that exemptions are to be narrowly construed and the employer is held to a strict burden of proof.

The Court of Appeals decision is entirely consistent with this Court's holdings in *Icicle Seafoods, Inc. v. Worthington,* 475 U.S. 709 (1986). Simple comparison of the Eighth Circuit's decisions in Murray I and Murray II clearly delineate the fallacy of Petitioners' position. The Ninth Circuit in *Icicle Seafoods* engaged in an independent *de novo* review of the facts as found by the trial court while the Eighth Circuit specifically focused on and analyzed each of the District Court's factual bases for its findings and conclusions.

To the extent that the District Courts findings were not supported by the record, the Court of Appeals set those findings aside as "clearly erroneous." In doing so, the Court of Appeals was careful to consider all facts presented in reaching its conclusion. As the record makes clear, the majority of fact questions do not turn on credibility issues since the Petitioners presented only three live witnesses at trial. The vast majority of the evidence

in this case was presented via deposition and through various schedules, manuals and other documents offered by the parties.

Petitioners and their counsel obviously disagree with the result of the decision of the Eighth Circuit. They have, however, failed to demonstrate that the Eighth Circuit has interpreted substantive or procedural case law so as to generate a conflict among the Circuits or with controlling decisions of this Court. Further, Petitioners can present no valid argument that the decision of the Court of Appeals "departed from the accepted and usual course of judicial proceedings" so as to call for review of the decision. No other special or important reasons for granting the Petition exist. Review of the Eighth Circuit decisions are, therefore, unwarranted.

ARGUMENT

I. AN EMPLOYEE'S EXEMPT OR NONEXEMPT STATUS UNDER THE FLSA IS A QUESTION OF LAW

In Murray II the Eighth Circuit addressed the two issues decided by the District Court; whether the Petitioners "customarily and regularly" supervised at least two other employees and whether Petitioners regularly exercised discretionary powers. *See* 29 C.F.R. § 541.1. The Court held that the District Court erred as a matter of law in ruling that Respondents failed to meet their required burden of proof on these two elements. The Court of Appeals reversed the decision of the District Court and ordered the court to dismiss the claims of the Petitioners.

In seeking review of the Eighth Circuit's rulings, Petitioners remain confused about the distinctions between questions of fact and questions of law. It is well-settled that the determination of exempt or nonexempt status in this type of case is the ultimate legal issue. *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709 (1986); *Walling v. General Industries Co.*, 330 U.S. 545 (1947). As this Court stated in *Icicle Seafoods* "the facts necessary to a proper determination of the legal question whether an exemption to the FLSA applies to a particular case should be reviewed by the Court of Appeals pursuant to Rule 52(a), like the facts in other civil bench-tried litigation in federal." *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. at 713. Furthermore, Rule 52(a) does not prohibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law. *Thornburg v. Gingles*, 478 U.S. 30 (1986).

Plaintiffs' counsel misstate this Court's holding in *Icicle Seafoods*. Plaintiffs construe the case to hold that the determination of the status of a particular employee under the FLSA is purely a fact question to be reversed only if clearly erroneous. Such analysis is incorrect.

> If the Court of Appeals believed that the District Court had failed to make findings of fact essential to a proper resolution of the legal question, it should have remanded to the District Court to make those findings. If it was of the view that the findings of the District Court were "clearly erroneous" within the meaning of Rule 52(a), it could have set them aside on that basis. If it

> believed that the District Court's factual findings were unassailable, but that the proper rule of law was misapplied to those findings, it could have reversed the District Court's judgment. *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. at 714.

Even though the law is clear, the Petitioners are unable or unwilling to accept that the only facts necessary to determination of legal questions are subject to review under the Rule 52(a) standard. In reality, the Eighth Circuit properly reviewed the necessary facts when making its determination of whether the District Court properly applied the applicable law.

As this Court noted in *Icicle Seafoods* the underlying question of how the plaintiffs spend their working time was a question of fact. However,

> "[T]he question *whether their particular activities excluded them from the overtime benefit of the FLSA is a question of law* which both parties concede is *governed by the pertinent regulations promulgated by the Wage and Hour Administrators.*" 475 U.S. at 714. (emphasis added).

In this case, what the duties and responsibilities of the store managers were and how they spent their working time were clearly questions of fact. Nevertheless, it is equally clear that the determination of whether or not their activities and responsibilities were sufficient to qualify them for the executive exemption, as defined by the regulations, involves questions of law.

II. THE EIGHTH CIRCUIT DID NOT ENGAGE IN FACT-FINDING OR SUBSTITUTE ITS JUDGMENT FOR THAT OF THE DISTRICT COURT ON THE FACTS

The Petitioners claim that the Eighth Circuit improperly engaged in fact finding contrary to the teaching of this Court's holding in *Icicle Seafoods, supra.* As previously stated, in Murray II, the District Court addressed two specific issues. In reviewing the District Court's decision, the Eighth Circuit held that the District Court's application of the legal standards was more rigid than the Department allowed. (Appendix at 12a) The Court also held that the District Court applied too cramped a view of the legal requirements for the discretionary powers test. (Appendix at 15a). In reaching its decision the Eighth Circuit methodically analyzed and reviewed the factual bases and rationale of the District Court's determination. In concluding that the District Court erred in construing the legal requirements, the panel did not engage in independent fact-finding. Rather, the Court appropriately determined that the law had been misinterpreted and misapplied to the undisputed facts.

A. Supervising Two or More Employees

In reviewing the District Court's ruling on whether the Respondents met their burden of proving that the managers supervised two or more employees, the Eighth Circuit noted that the Regulations state that an employee qualifies as an executive "if he 'customarily and regularly' supervises at least two full-time employees or the equivalent." 29 C.F.R. § 541.105(a). The court stated that

"customarily and regularly" is defined as signifying "a frequency which must be greater than occasional but which, of course, may be less than constant." 29 C.F.R. § 541.107(b). Applying this law to the undisputed fact that the store managers supervised at least two or more employees who worked 80 hours per week 98 percent of the time, the Court found that the definition of customarily and regular had been met. (Appendix at 11a).

Similarly, the Court found that although a "forty hour week is generally the equivalent of a full-time employee, the Department of Labor in applying this regulation recognizes that this is not a rigid standard." (Appendix at 11a). Additionally, the Court found that Wage and Hour regulations further provide that "unusual circumstances might occasionally justify lower standards." (Appendix at 11a). The Eighth Circuit found that the "unusual circumstances" provision which allowed for lower standards was met by the undisputed fact that some of the managers testified that they operated on a skeletal basis in the winter rather than closing altogether. Consequently, the Court held that the District Court erred in finding that the managers did not supervise two or more employees. In reaching this decision, the Eighth Circuit did not engage in independent fact finding. Rather, the Court appropriately determined that the law had been misapplied to the undisputed facts of record.

B. Exercising Discretionary Powers

The second issue reviewed by the Court was whether the Respondents failed to show that the managers exercised discretionary powers. The Petitioners argue that the

Court inappropriately substituted its judgment for that of the trial court when it held that "the district court took too cramped a view of what constitutes managerial discretion." (Petitioners' Brief at 19). This argument is a classic example of how the Petitioners have confused questions of fact and questions of law.

The District Court held that the day-to-day duties of the managers were circumscribed by the fact that the managers were required to follow company policies, training manuals, and recommended labor schedules as well as seek the approval of the regional manager before making certain decisions. Consequently, the District Court held that the manager's work was so "routinized that he had no discretion within the meaning of 29 C.F.R. § 541.107(a)." (Appendix at 37a).

On appeal, however, the Eighth Circuit held that discretionary powers under Section § 541.107(a) include opening and closing the store, scheduling employee hours, customer relations, ordering merchandise, granting discounts and markdowns, extending credit, approving checks, resolving customer complaints, inventory maintenance and implementing display techniques. (Appendix at 16a). Furthermore, the Court held that active supervision and periodic visits by a regional manager do not eliminate the day-to-day discretionary functions of the on-site manager. (Appendix at 15a). The Court also held that the undisputed testimony of the managers showed that they hired other employees, scheduled employee work hours, trained and disciplined employees, and handled customer complaints. (Appendix at 15a). Similarly, the Court found that simply because the Respondent, a nationwide company with multiple

outlets, established standardized procedures and polices to guide the individual store managers did not eliminate the finding of day-to-day discretionary powers. *See Donovan v. Waffle House, Inc.*, 26 Wage & Hour Cas. (BNA) 868, 874 (N.D. Ga. 1983); *Marshall v. Sally Beauty Co.*, 25 Wage & Hour Cas. (BNA) 672, 673 (E.D. La. 1982).

Clearly, the Court did not set aside the District Court's factual findings or substitute its judgment for that of the District Court. Instead, the Court noted that the interpretation of discretionary powers by other courts and the Secretary of Labor include duties and responsibilities not applied by the District Court. Consequently, the Court found that the District Court's application of the law to the undisputed facts was too cramped. The Court held that the District Court's factual findings were based on an erroneous application of the law.

III. FINDINGS OF FACT INDUCED BY AN ERRONEOUS VIEW OF CONTROLLING LEGAL PRINCIPLES ARE NOT BINDING

The Petitioners insist that the question of whether the employer met its burden of proving that the FLSA exemption applies requires the District Court to make inferences based on historical facts and that such historical facts can only be reviewed for clear error. The Respondents readily concede that questions of fact are involved in determining the particular activities and duties of store managers, i.e., how they spent their working time. But the teaching of *Icicle Seafoods* is that resolution of an exemption claim under the FLSA involves questions of

both fact and law. Where questions of fact are predicated on an erroneous view of the law, Rule 52(a) does not prescribe the standard of review. *United States v. United States Gypsum Co.*, 333 U.S. 364, 394 (1948). The Eighth Circuit's opinion in both Murray I and Murray II is premised on the determinations that the District Court misconstrued the law, specifically in the form of § 541.102-103, § 541.105, § 541.107, § 541.113, and misapplied it to the facts to reach the conclusion that store managers were not executive employees.

If it is assumed the District Court's holding that store managers did not satisfy the executive employee test is a finding of fact, it is apparent that this finding resulted from erroneous application of controlling legal principles. As such, it was not binding on the appellate court. *Johnson v. Uncle Ben's, Inc.*, 628 F.2d 419 (5th Cir. 1980), *vacated* 451 U.S. 902 (1981), *opinion on remand*, 657 F.2d 750 (5th Cir. 1981). As this Court held in *Bose v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 501 (1984), "Rule 52(a) does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of fact that is predicated on a misunderstanding of the governing rule of law."

In this case, the Eighth Circuit did not substitute its judgment of the underlying facts relevant to the duties, discretionary powers and supervision of employees and the actual work they performed for that of the District Court. Rather, the Court substituted its interpretation of the legal requirements for the elements of the executive exemption, for that of the District Court. In so doing, the Eighth Circuit acted in accordance with the accepted

course of judicial proceedings for appellate courts. Respondents were and are entitled to a reversal of the District Court's erroneous interpretations of the law governing the executive exemption. Respondents were rightfully held to a higher standard of proof in claiming an exemption from the FLSA but Petitioners' suggestion that equal treatment in the appellate process should not be afforded them solely because of their employer status is entirely unfounded.

IV. THE DISTRICT COURT'S RULINGS WERE CLEARLY ERRONEOUS

In any event, if the Eighth Circuit's reversal of the District Court's rulings in Murray I and Murray II is perceived as setting aside findings of fact rather than correcting errors of law, it is apparent from the opinion that the panel found the rulings to be clearly erroneous. In *United States v. United States Gypsum Co.*, 333 U.S. 364, 394-396 (1948), this Court held that a finding by a trial court, if it be by a judge, "is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . "

The Petitioners repeatedly stress that credibility was an important issue in this matter which should be left to the sole discretion of the trial court. However, a review of the record shows that all but three of Petitioners' witnesses testified by deposition with the remaining evidence consisting of documents. Under the Rule 52(a) standard when a case is tried to the court without a jury and fact issues are decided on written evidence, the

appellate court is just as able to determine credibility as the trial court, and thus may disregard the trial court's findings. *Orvis v. Higgins*, 180 F.2d 537, 539 (2nd Cir.) *cert. denied* 340 U.S. 810 (1950). Similarly, if the evidence is partly oral and the balance is written or deals with undisputed facts, then the appellate court may ignore the trial judge's findings and substitute its own. *Id.*

In this case, the Court held that the District Court's rejection of the Respondents' analysis of payroll records and the testimony of Anthony Naughton was error due to the highly relevant nature of the evidence. In reaching this conclusion, the Court noted that the Petitioners did not challenge the methodology of the payroll analysis nor did they attempt to impeach Naughton's testimony. (Appendix at 9a). Since this evidence consists of written documentation and undisputed facts, the Eighth Circuit clearly had the authority to ignore the trial court's finding and substitute its own judgment.

In addition, the Court noted that the District Court found that one manager, Russell Renecker, admitted that he supervised as many as eight or ten employees and never fewer than two. (Appendix at 10a). The Court also found that the District Court, while crediting this testimony and noting that there were others similar to Renecker out there "but the evidence was not presented to this court," was a clearly erroneous finding. (Appendix 10a). The Court reached this conclusion by noting that fifteen other managers testified that they also regularly supervised two or more employees, while the remaining twelve managers indirectly testified that they also supervised two or more employees. (Appendix 10a). It is clear from the language of the Court's opinion that upon a

review of the entire record it was "left with the definite and firm conviction" that mistakes had been committed. *Anderson v. Bessemer City, N.C.*, 470 U.S. 564 (1985).

Based upon the testimony of the Petitioners along with Naughton's study, the Court found that the Petitioners regularly supervised two or more full-time employees. (Appendix at 10a). Based upon this holding, the District Court's contrary findings and/or conclusions had to be clear error.

The Eighth Circuit did not construe its holdings as setting aside findings of fact, but even if the decision is scrutinized under the Rule 52(a) standard, there is no doubt that the standard was met. Furthermore, whether they are categorized as mistakes of fact or mistakes of law, the outcome would be the same. The District Court clearly erred in findings and concluding that Respondents did not meet their burden of proof to show that managers were executive employees.

V. NONE OF THE CONSIDERATIONS FOR REVIEW ON WRIT OF CERTIORARI ARE PRESENT IN THIS CASE

The Eighth Circuit correctly ruled in Murray I and Murray II that Respondents proved, as a matter of fact and of law, Stuckey's store managers met the elements necessary for exemption from FLSA wage and overtime requirements as executive employees.

Insofar as the merits of the Eighth Circuit decision are concerned, Petitioners have pointed to no appellate cases which conflict with the Court's interpretations of

the required elements for the executive employee exemption. Petitioners cannot and do not argue that the Eighth Circuit erroneously interpreted or applied the law. They simply argue that the Court should not have reversed the District Court's "findings of fact." It is apparent that the Eighth Circuit based its reversal, in both Murray I and Murray II, on perceived errors of law. However, because it found the District Court holdings to be clear error, the result would be no different whether or not the Rule 52(a) standard of review was applied. For that reason, there is absolutely nothing about this case that requires the attention of this Court.

Petitioners advance the argument as the last of their Questions Presented for Review that the Eighth Circuit has departed from the accepted and usual course of judicial proceedings. Respondents submit that such an argument borders on being frivolous. The sole basis for it is the representation that Petitioners have found no other Court of Appeals decisions which overturned findings in favor of employees on the executive employee exemption. Apparently, they did not bother to read the First Circuit's *Donovan v. Burger King Corp.*, 675 F.2d 516 (2d Cir. 1982) decision cited and relied upon as legal precedent in the Eighth Circuit's opinion. However, Petitioners' or their counsel's lack of diligence aside, whether any similar cases exist is totally irrelevant. FLSA exemption cases are peculiar because they are always dependent on individual fact situations. Petitioners' argument amounts to nothing more than saying that an award to employees should never be reversed. Such a proposition is patently absurd.

No reasonable interpretation of the Eighth Circuit opinion in this case could lead to the conclusion that the panel "dramatically departed from the accepted and usual course of judicial proceedings" or that this case "cries out for the exercise of this Court's power of supervision." (Petition at 26). The action fully comports with the principles of law enunciated in *Icicle Seafoods, supra.*

CONCLUSION

Petitioners have not shown the existence of any significant issue of substantive or procedural law, let alone special or important reasons, which call for review or supervision by this Court on writ of certiorari. The Eighth Circuit's rulings are not in conflict with the decisions of this Court cited by Petitioners nor are they in conflict with other circuits which have interpreted the burden of proof in FLSA exemption cases. The Eighth Circuit has corrected what otherwise would have been a grievous error, based on its determination that store managers clearly and unmistakenly met the terms of the executive exemption under 29 C.F.R. § 541.1. The case should be

returned to the District Court for further proceedings in accordance with the opinion.

Accordingly, the Petition should be denied.

Respectfully submitted,

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No. 95-38

In The

Supreme Court of the United States

October Term, 1995

GLADYS MURRAY, On Behalf of Herself and All Others Similarly Situated (and 27 Other Individuals),

Petitioners,

v.

STUCKEY'S, INC., AND PET INCORPORATED,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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Reply Brief for Petitioners

I

Respondents Concede that the Three-judge Panel Substituted Its Judgment of the Facts for That of the Trial Court

Respondents concede in their brief (p. 7) that " . . . what the *duties* and *responsibilities* of the store managers were and how they spent their working time were clearly questions of fact." (emphasis supplied)

Again, at page 11 of their brief, Respondents state that: "The Respondents readily *concede* that questions of fact are involved in determining the particular *activities* and *duties* of store managers, i.e., how they spent their working time." (emphasis supplied)

On the subjects of *duties, responsibilities,* and *activities* the trial court made findings of fact that:

> 1) The *duties* of the claimed exempt and admittedly non-exempt employees were essentially the same. (1989 Order, Finding of Fact 17, p. 86a).
>
> 2) The Plaintiffs spent 65 to 90% of their time on non-managerial *duties.* (p. 68a).
>
> 3) The Defendants have failed in their burden of proof that the employees were exempt from the overtime provisions of the Act (Finding of Fact 29, p. 96a).
>
> 4) Defendants have failed in their burden of proof that the primary *duty* of Plaintiffs was management (Finding of Fact 28, p. 95a).
>
> 5) Defendants failed in their burden of proof that Plaintiffs were in *"sole charge"* of their stores (Finding of Fact, 29, p. 96a).

> 6) Defendants had not met their burden of proof that Plaintiffs *customarily* and *regularly* directed the work two or more employees (p. 34a).
>
> 7) Defendants have not met their burden of proof that Plaintiffs *customarily* and *regularly* exercised discretionary power. (p. 38a). (Emphasis supplied)

The three-judge panel left standing the first of those findings of fact. The three-judge panel acknowledged that the second of those findings of fact was not clearly erroneous and so it also stands.

The three-judge panel then set aside the remaining five findings of fact. It did so in spite of the fact that the first two of those findings of fact have not been disturbed. It seems clear the trial court drew inferences from the first two findings in making the five findings of fact for which the three-judge panel substituted its judgment.

All seven of those findings of fact deal with *duties, responsibilities* and *activities* of the employees. The questions of "customarily and regularly" which are involved in the last two of those findings are questions of "frequency" and are clearly questions of fact.

Since all of these questions are conceded by Respondents to be questions of fact, it is clear that *Murray I* and *Murray II* conflict with decisions of other Circuits, and depart from the accepted and normal course of Judicial proceedings. Therefore, the Writ of Certiorari should be granted and the case summarily reversed as prayed at page 28 of the Petition.

II

Respondents Mistakenly Pretend that this Case was Based on "Undisputed Facts"

Respondents refer at page 3, at page 9, and again at page 11 to the "undisputed facts"[1] of this case and suggest that this case was tried with only three Petitioners' witnesses and a huge volume of documents.

But that is not true. There was a four-day bench trial in which Petitioners presented 59 witnesses (three live and the rest by deposition). Those witnesses presented by Petitioners by deposition included a Senior Vice-President, a regional manager, and at least two former regional managers of the Respondents. Respondents presented eight live witnesses, but listed 19 live witnesses in the Final Pre-trial Order.

Certainly, the three-judge panel did not agree in *Murray I* that the case was tried on "undisputed facts." It remanded for findings of fact for two factual issues. The panel noted that one of the issues was "a contested issue at trial" (page 73a) and that discretion of the "managers" was circumscribed or limited. And certainly, the inferences to be drawn from the facts presented were highly contested and disputed. The questions of "customarily and regularly" were highly disputed.[2]

---

[1] The only undisputed facts in this case involved deductions from salary for sickness. That testimony was discussed in footnote 3 of the Petition and will not be repeated here. That testimony supports judgment for the Petitioners but was ignored by both the trial court and the panel.

[2] Respondents begin their brief on page 1 by noting that the Petitioners alleged that they worked 24 hours per day. Respondents omit the fact that this claim was for compensation for interrupted sleep time under 29 C.F.R. § 785.22(b). The trial

III

Credibility was a most Significant Issue in this Case

Respondents assert at page five of their brief, and again at page thirteen that credibility issues were not present in this case because Petitioners presented only three live witnesses at trial with the remainder of the Petitioners testifying by deposition.

But it was not the credibility of Petitioners' witnesses that was at issue at trial. At issue was the credibility of the Respondents and their witnesses. Respondents induced employees to falsify records, while Respondents themselves falsified answers to interrogatories and had the burden of proof on the executive exemption. They presented eight live witnesses at trial and it is their credibility that was at issue in this case, *not* the credibility of the Petitioners.

IV

Respondents Misread or Misinterpret Controlling Decisions of this Court.

At page four of their Brief, Respondents assert that the decisions of the three-judge panel are " . . . entirely consistent with . . . *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709 (1986)." Respondents then go on to say that "The Ninth Circuit engaged in an independent *de novo* review of the facts as found by the trial court . . . "

---

court held that Petitioners failed to carry their burden of proof on this issue (pages 117a-119a). Respondents had the burden of proof on the issues presented to the Court of Appeals. Respondents should accept the trial court's findings of fact as Petitioners have done.

That is not true. The Ninth Circuit said in its review of *Icicle* that ". . . we can review the question in this instance as one of law." *Worthington v. Icicle Seafoods, Inc.*, 774 F.2d 349, 353 (9th Cir. 1984). That is not an independent *de novo* review of facts.

In an opinion written by Justice Rehnquist, this Court disagreed. Justice Rehnquist said the Ninth Circuit had engaged in fact finding, noting that

> "The question of how the respondents spent their working time aboard the *White Star* is a question of fact." 475 U.S. at 714

So we see that the Ninth Circuit in *Icicle*, like the Eighth Circuit here, engaged in fact finding under the guise of deciding questions of law. There is no procedural difference between *Icicle* and this case. The only difference between *Icicle* and this case, though perhaps irrelevant, is that in the *Icicle* trial court, the employer prevailed on the facts. In this case, the employees prevailed on the facts in the trial court.

V

The Eighth Circuit did in Fact Substitute Its Judgment of the Facts for That of the Trial Court.

Notwithstanding the concessions by Respondents pointed out in Division I of this Brief, Respondents include in their Brief a Division II at page 8. In that Division they contend that the Eighth Circuit did not engage in fact finding or substitute its judgment for that of the trial court. But the Petition itself (amplified by Respondents' concessions) demonstrates that the panel did engage in fact finding and substitute its judgment of the facts for that of the trial court.

The Respondents in Division II discuss *two* of the *five* findings of fact that were set aside. They do not address at all *three* of the *five* findings of fact which were set aside by the panel, although the other three findings were individually addressed in the Petition. Respondents do not disagree with Petitioners' contention that if the panel erred in setting aside any *one* of the *five* findings of fact the opinions of the panel must be set aside.

Petitioners' position as to the three findings of fact set aside in *Murray I* has been addressed in the Petition and will not be further addressed here.

As to the issue of "Supervising Two or more Employees", the trial court findings were in part based on credibility, as pointed out in the Petition and as further demonstrated in Division III of this Brief.

On the issue of "Exercising Discretionary Powers" Respondents completely ignore the requirement that such powers be *"customarily and regularly"* exercised. That was the fighting issue on remand. Petitioners have never contended that they did not *on occasion* exercise *some* discretionary powers. But Petitioners have always contended that the exercise of discretion was neither *customary* nor *regular*. This created a factual issue which was decided by the trial court in favor of Petitioners. The panel substituted its judgment of those facts for that of the trial court.

VI

The Opinions of the Panel Conflict with Decisions of other Courts

The Respondents assert at page 3 of their Brief "Petitioners' contentions that the Eighth Circuit's decision . . . conflicts with recent decisions of three other Circuit Courts of Appeal, are without support."

Then, in the Conclusion of the Brief at page 17 the Respondents again assert that "the Eighth Circuit rulings are not in conflict with the decisions of this Court . . . *nor are they in conflict with other circuits* which have interpreted the burden of proof in FLSA exemption cases." (emphasis supplied)

Except for these two conclusionary statements, Respondents do not deal with this issue which was presented and discussed beginning at page 22 of the Petition. That material need not be repeated herein.

However, Petitioners do point out that the concessions as to the factual nature of the issues relating to *duties, responsibilities,* and *activities* pointed out in Division I of this Brief, make it abundantly clear that the opinion of the three-judge panel conflicts with the opinions of three other Circuits. *Dahlheim v. KDFW-TV,* 918 F.2d 1220 (5th Cir. 1990); *Brock v. Mr. W. Fireworks Inc.,* 814 F.2d 1042 (5th Cir. 1987), *cert. denied,* 484 U.S. 924 (1987); *Martin v. Cooper Electric Supply Co.,* 940 F.2d 896 (3rd Cir. 1991) and *Brock v. Norman's Country Market, Inc.,* 835 F.2d 823 (11th Cir. 1988), *cert. denied,* 487 U.S. 1205 (1988).

Two of these cases, *Dahlheim* and *Norman's Country Market,* dealt with setting aside findings of fact as to "primary duty" as does this case (See Division C of the Petition beginning at page 22.) There is clearly a conflict among the Circuits.

VII

The Eighth Circuit has so far Departed from the Accepted and Usual Course of Judicial Proceedings as to call for an Exercise of this Court's Power of Supervision.

At page 16 of their Brief, Respondents assert that "the sole basis for it (Question Presented for Review No.

3) is the representation that Petitioners have found no other Court of Appeals decisions which overturned findings in favor of employees on the executive employee exemption."

But that is not what Petitioners said. Because Petitioners' language has been misquoted, Petitioners call attention to the last paragraph of page 26 and the first paragraph of page 27 of the Petition.

Reading of these two paragraphs will make it clear that there are no other reported cases where a Court of Appeals has overturned findings of fact by the trial court in favor of workers as to "primary duty" with respect to employees *making less then $250 per week.*

Respondents suggest that the First (sic) Circuit's decision in *Donovan v. Burger King Co.*, 675 F.2d 516 (2nd Cir. 1982) is such a case. But it is not. In *Burger King*, the Second Circuit left standing judgments in favor of employees earning less than $250 per week.[3]

Petitioners also stated in their Petition that they were even more confident that there have been no reported decisions in which a Court of Appeals has set aside *five* separate findings of fact, letting stand findings of fact conflicting with the new findings by the Court of Appeals. The Petitioners then pointed out that any *one* of these findings erroneously set aside would justify the judgment of the trial court.

Instead, Respondents claim the *sole basis* for petitioner's position is nullified by *Burger King, supra.* Had

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[3] If Respondents were correct then that Circuit would be in conflict with *Dahlheim, supra,* and *Norman's Country Market, supra.*

Respondents "bothered to read" (the words of Respondents) Question Presented for Review No. 3 and the text of this section of the Petition, Respondents would have discovered the omitted language of the Petition pointed out above. They would have further discovered from the Question Presented itself that Petitioners also relied on the fact that "the Court of Appeals ignored previous controlling decisions of this Court in other FLSA cases" and "substitutes its judgment for that of the trial court on *five* separate findings of fact when any one of the trial courts' findings of fact would support the judgment of the trial court." And had they read the Question they would have discerned that the "sole basis" for Petitioners was not as stated at page 16 of the Respondent's Brief. There was and is much more.

It is also noteworthy that Respondents concede at page 16 of their Brief that "FLSA cases are peculiar because they are always dependent on individual *fact* situations." (emphasis supplied) To contend that the Court of Appeals decided only legal issues and did not substitute its judgment of facts for that of the trial court seems preposterous.

Ironically, although Respondents concede that FLSA cases are always dependent on individual fact situations, they cite two district court cases, *Donovan v. Waffle House, Inc.*, 26 Wage & Hour Cas. (BNA) 868, 874, 99 Lab. Cas. (CCH) ¶ 34,457 (N.D. Ga. 1983) and *Marshall v. Sally Beauty Co.*, 25 Wage & Hour Cas. (BNA) 672,673, 94 Lab. Cas. (CCH) ¶ 34,207 (E.D. La. 1982), with entirely different facts, on page 11 of their Brief. In *Waffle House*, the alleged managers were paid substantially more on an hourly basis than the hourly employees. In *Sally Beauty*,

the parties *stipulated* that the employee was "in sole charge."

CONCLUSION

For the reasons stated in our Petition and in this Reply Brief, we respectfully submit our Petition for Writ of Certiorari should be granted, and that pursuant to Rule 16.1 of the Rules of the Supreme Court of the United States, this Court should set aside the opinions of the Court of Appeals in *Murray I* and *Murray II*, reinstate all five findings of fact of the trial court, and that the matter should be remanded to the trial court for recomputation of damages to be awarded to Russell Renecker.

DATED at Sioux City, Iowa, August 25, 1995,

Respectfully submitted,

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